

CLAIMS AGAINST THE STATE OF OHIO: SOVEREIGN IMMUNITY, THE SUNDRY CLAIMS BOARD AND THE PROPOSED COURT OF CLAIMS ACT

Sovereign immunity has long shielded the State of Ohio from suit in Ohio courts for wrongs committed by the state or its agents. But since 1917 an administrative means of redressing wrongs committed by the state and enforcing rights against the state has been available in the form of the Ohio Sundry Claims Board. Although all previous legislative attempts to waive the state's sovereign immunity on a broad scale had been unsuccessful, in 1973 the House of Representatives passed and sent to the Senate a bill waiving the State's immunity and granting the right to proceed against the state in a court of law. The Senate judiciary committee recommended passage of an amended version, and at the time of this writing the bill was still awaiting full Senate action. This note will survey the principle of sovereign immunity in Ohio, examine critically the present sundry claims procedure, and, finally, analyze the bill presently pending in the General Assembly.

I. OHIO SOVEREIGN IMMUNITY

A. *In General*

In Ohio, as in most states,¹ sovereign immunity has two aspects, in that the state enjoys both immunity from liability² and immunity from suit without its consent.³ Immunity from *liability* means that even if one is injured by the state, the injury is not a legal wrong and creates no cause of action against the state; immunity from *suit* means that state courts do not have subject matter jurisdiction over any suit instituted against the state unless a statute expressly provides otherwise. Since both immunities shield the state from effective suit, either one can be asserted by

[Editor's Note—On May 29, 1974, as this article went to press, the Ohio Senate passed the Court of Claims Act by a vote of 23-8. Concurrence by the state House of Representatives followed. The Act will go into effect on January 1, 1975.]

¹ Comment, *State Immunity From Suit Without Consent: Scope and Implications*, 1971 WIS. L. REV. 879, 880. See *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) and *Holytz v. Milwaukee*, 17 Wis. 2d 37, 115 N.W.2d 618 (1962).

² *Wooster v. Arbenz*, 116 Ohio St. 281, 156 N.E. 210 (1927); *Dunn v. Agricultural Soc'y*, 46 Ohio St. 93, 18 N.E. 496 (1888); *Wheeler v. City of Cincinnati*, 19 Ohio St. 19 (1869).

³ *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972); *Wolf v. Ohio State Univ. Hosp.*, 170 Ohio St. 49, 162 N.E. 2d 475 (1959); *State ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82, *cert. denied*, 332 U.S. 817 (1947); *Palumbo v. Indus. Comm'n.*, 140 Ohio St. 54, 42 N.E.2d 766 (1942); *Raudabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102 (1917).

the state as an absolute defense against a plaintiff. Both methods of asserting sovereign immunity have been used by the State of Ohio.⁴ Since subject matter jurisdiction is fundamental to the right of the court to hear a case, and since it cannot be waived, the parties or the court may at any time,⁵ even on appeal, raise the question of the state's immunity from suit and have the action dismissed, even though originally the state had based its defense on a theory of immunity from liability. Indeed, Ohio case law is replete with cases where the supreme court has affirmed a trial court's dismissal for failure to state a cause of action on the express ground that the state is not subject to suit without its consent.⁶

The state's sovereign immunity protects all its departments, agencies and instrumentalities against suit unless the state has given its statutory consent. It is axiomatic that a suit against a department of the state government is a suit against the state itself.⁷ State universities, state hospitals, public boards of education, state or local governmental units, and, in certain instances, municipal corporations are agencies or instrumentalities of the state and are thus protected by sovereign immunity because, in the words of the supreme court, "A suit against a public corporation having no powers other than the performance of a function of the government and accomplishing no other object, is plainly a suit against the government and its property, although nominally it is a suit against the corporation only."⁸ Counties, townships, and other public corporations

⁴ E.g., *Wolf v. Ohio St. Univ. Hosp.*, 170 Ohio St. 49, 162 N.E.2d 475 (1959) (demurrer); *Thacker v. Board of Trustees*, 35 Ohio St. 2d 49, 298 N.E.2d 542 (1973) (motion to dismiss for failing to state a claim upon which relief could be granted); *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972) (motion to quash service of summons).

⁵ OHIO R. CIV. P. 12(H).

⁶ E.g., *Thacker v. Board of Trustees*, 35 Ohio St. 2d 49, 298 N.E.2d 542 (1973); *Wolf v. Ohio St. Univ. Hosp.*, 170 Ohio St. 49, 162 N.E. 2d 475 (1959); *State ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82, cert. denied, 332 U.S. 817 (1947); *Palumbo v. Indus. Comm'n*, 140 Ohio St. 54, 42 N.E.2d 766 (1942).

Another theory which would explain the results in these cases is that immunity from suit creates an immunity from liability, coextensive with and dependent upon the immunity from suit. The term "cause of action" denotes a set of circumstances constituting an injury for which the courts give redress. If a set of circumstances includes the circumstance that the state is the defendant, then, because of immunity from suit, courts do not give relief for the injury shown by that set of circumstances, and therefore the set of circumstances does not show a cause of action. Because this is so whenever the state is the defendant and has not waived its immunity from suit, it may be said that an immunity from liability derives from the immunity from suit in all cases, and thus that a demurrer or motion to dismiss for failure to state a claim upon which relief can be granted should be sustained when the state has not waived its immunity from suit.

⁷ *West Park Shopping Center, Inc. v. Masheter*, 6 Ohio St. 2d 142, 216 N.E.2d 761 (1966); *Palumbo v. Indus. Comm'n*, 140 Ohio St. 54, 42 N.E.2d 766 (1947); *State ex rel. Clark v. Dept. of Mental Hygiene & Correction*, 72 Ohio L. Abs. 340, 135 N.E.2d 72 (Ct. App. Franklin Cty. 1955).

⁸ *Overholser v. National Home*, 68 Ohio St. 236, 248, 67 N.E. 487, 489 (1903). See also *Thacker v. Bd. of Trustees*, 35 Ohio St. 2d 49, 298 N.E.2d 542 (1973) (Ohio State

which are merely territorial and political subdivisions of the state are "clothed with the same immunity from liability as the state itself."⁹

Several state instrumentalities, agencies, and political subdivisions have been given the power "to sue and to be sued" by the statutes creating them. Thus to some extent the sovereign immunity of these entities has been waived by statute. However, such statutes have uniformly been interpreted by the supreme court to grant the state's consent to suit, and thus to waive immunity from liability, only as to such matters as are within the scope of the other corporate powers of the entities. Consequently, those statutes do not, for example, authorize suit or create liability for torts,¹⁰ because, the court has said, the entities were not authorized to commit torts and it was not contemplated that they would do so.¹¹ Entities with the power "to sue and to be sued" may be sued in contract if they were given the power to enter contracts in order to carry out their purposes, but they cannot be sued for negligence.

The application of sovereign immunity to local political entities is somewhat more complex. Ohio law has distinguished between municipal corporations and purely political subdivisions of the state, such as counties and townships. The latter are regarded as "quasi-corporations" because few corporate powers are conferred on them, while municipalities are regarded as corporations in the true sense of the word because

University and Ohio State University Hospitals, as instrumentalities of the state, are not subject to suit in tort); *Wolf v. Ohio State Univ. Hosp.*, 170 Ohio St. 49, 162 N.E.2d 475 (1959) (some holding as in *Thacker*); *Wayman v. Board of Educ.* 5 Ohio St. 2d 248, 215 N.E.2d 394 (1966) (A board of education acts as one of the state's ministerial educational agencies, and a suit against the board is a suit against the government and its property); *Schaffer v. Board of Trustees*, 171 Ohio St. 228, 168 N.E.2d 547 (1960) (A county and its agencies are instrumentalities of the state and are immune to a suit for negligence); *Broughton v. Cleveland*, 167 Ohio St. 29, 146 N.E.2d 301 (1957) (When engaged in a governmental function, a "municipality becomes an arm of sovereignty and a governmental agency" entitled to the state's sovereign immunity). In *Palumbo v. Industrial Commission*, 140 Ohio St. 54, 42 N.E.2d 766 (1962), the supreme court held that in the absence of a special statute allowing a garnishment proceeding against the state, the wages of an employee of the state Industrial Commission could not be garnished because, although the state would not have to pay any of its money except that owed to the judgment debtor if all went well, the state might be subject to liability if state officials paid the wages over to the judgment debtor in violation of the court's judgment. On the other hand, in *American Life & Accident Ins. Co. of Kentucky v. Jones*, 152 Ohio St. 287, 89 N.E.2d 301 (1949), the supreme court ruled that a declaratory judgment action by an insurance company against the administrator of the Bureau of Unemployment Compensation, to declare and determine the rights and status of the insurance company under the unemployment compensation act, was not a suit against the state because the declaratory judgment sought would affect only funds which belonged to the insurance company.

⁹ *Dunn v. Agricultural Soc'y*, 46 Ohio St. 93, 97, 18 N.E. 496, 497-98 (1888).

¹⁰ *Wolf v. Ohio St. Univ. Hosp.*, 170 Ohio St. 49, 162 N.E.2d 475 (1959); *Overholser v. National Home*, 68 Ohio St. 236, 67 N.E. 487 (1903); *Board of Educ. v. Volk*, 72 Ohio St. 469, 74 N.E. 646 (1905); *Finch v. Board of Educ.*, 30 Ohio St. 37 (1876); *Board of Comm'rs v. Mighels*, 7 Ohio St. 109 (1857).

¹¹ *Overholser v. National Home*, 68 Ohio St. 236, 250, 67 N.E. 487, 490 (1903).

of their extensive corporate powers.¹² Counties are protected in all of their functions by sovereign immunity, except to the extent that immunity has been waived by statute.¹³ Municipalities, however, are not so fully protected.

Since 1854 the Ohio Supreme Court has drawn a distinction between governmental and proprietary functions of municipal corporations.¹⁴ When a function of the city is governmental, the city is regarded as an agent of the state government and is protected by the state's sovereign immunity. But when the function is classified as proprietary, the action is regarded as performed "in pursuit of private and corporate duties, for the particular benefit of the corporation and its inhabitants, as distinguished from those things in which the whole state has an interest," and the municipality is subject to liability for wrongs committed in the course of the function.¹⁵ While the governmental-proprietary distinction has not always been easy to apply,¹⁶ it has been maintained in Ohio law except for a brief period from 1919 to 1922.¹⁷

When neither the state nor any other entity clothed with the sovereign immunity of the state is the nominal defendant in an action, the action is nevertheless regarded as one against the state if the state is the *real party in interest*, that is, if the liability sought to be established is that of the state.¹⁸ If the rights of the state would be directly and adversely affected by the judgment or decree sought in an action against a state official, the

¹² *Schaffer v. Board of Trustees*, 171 Ohio St. 228, 168 N.E.2d 547 (1960); *Board of Comm'rs v. Mighels*, 7 Ohio St. 109 (1857).

¹³ *Schaffer v. Board of Trustees*, 171 Ohio St. 228, 168 N.E.2d 547 (1960).

¹⁴ *Dayton v. Pease*, 4 Ohio St. 80 (1854).

¹⁵ *Hack v. Salem*, 174 Ohio St. 383, 387, 189 N.E.2d 857, 860 (1963); *Wooster v. Arbenz*, 116 Ohio St. 281, 283, 156 N.E. 210, 211 (1927).

¹⁶ Lists of the various tests are contained in *Hack v. Salem*, 174 Ohio St. 383, 338, 189 N.E.2d 857, 860-861 (1963) and *Wooster v. Arbenz*, 116 Ohio St. 281, 284, 156 N.E.2d 210, 211-212 (1927). As is pointed out in Justice Gibson's concurring opinion in *Hack v. Salem*, the supreme court has at different times reached inconsistent or opposite results as to the class in which a particular function is to be placed. The trend in recent decisions has been to narrow the scope of the class of governmental functions of municipalities. See *Sears v. Cincinnati*, 31 Ohio St. 2d 157, 285 N.E.2d 732 (1972) in which the Ohio Supreme Court removed the defense of governmental immunity from municipally owned hospitals because municipalities have no statutorily imposed duty to own or operate a hospital and because the maintenance of a hospital is not essential to the government of a municipality.

¹⁷ *Fowler v. Cleveland*, 100 Ohio St. 158, 126 N.E. 72 (1919); *overruled*, *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922).

¹⁸ *State ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82 (1947); *Reed v. Timberman*, 65 Ohio App. 182, 29 N.E.2d 446, *appeal dismissed*, 137 Ohio St. 524, 30 N.E.2d 993 (1940); *State ex rel. Board of County Comm'rs v. Rhodes*, 86 Ohio L. Abs. 390, 177 N.E.2d 557 (C.P. Franklin Cty. 1960); *Ley v. Kirtley*, 5 Ohio N.P. (n.s.) 529, 18 Ohio Dec. 280 (C.P. Summit Cty. 1907).

suit is barred by sovereign immunity unless the state has consented to suit.¹⁹

If the relief sought in an action against a state officer is such that it could operate to control the actions of the state or subject the state to liability, the suit is regarded as one against the state although the relief may be nominally directed against the defendant as an individual.²⁰ A suit may be maintained against a state officer, however, in which equitable relief is sought to restrain him from acting in violation of a statute,²¹ or in excess of his powers,²² or to restrain him from enforcing a statute claimed to be unconstitutional,²³ or to compel him to perform a duty imposed on him by statute.²⁴ In such cases the suits are regarded as being against the official *as an individual*, rather than against the state.

There is, however, at least one exception to the state's sovereign immunity which will permit suit to lie against state officers, state agencies and the state itself. In *Wayman v. Board of Education*,²⁵ the supreme court ruled that an injunction could be obtained against a board of education which creates or maintains a nuisance on its property in such a manner that the property of the plaintiff is endangered or injured. Although no suit would lie in tort for damages caused by such a nuisance, the creation or maintenance of the nuisance could be enjoined.²⁶ Thus, courts will protect a plaintiff against present active wrongdoing by the state or its agencies, although redress for injuries already perpetrated cannot be had through the courts.

B. Common Law Sovereign Immunity in Ohio

Sovereign immunity in Ohio was originally a judicially created doc-

¹⁹ State *ex rel.* Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947). See also West Park Shopping Center, Inc. v. Masheter, 6 Ohio St. 2d 142, 216 N.E.2d 761 (1966), in which the court held that an action against the Director of Highways to quiet title to property in which the state had an easement for roadside park purposes could not be maintained without the state's consent because the state was the real party in interest.

²⁰ State *ex rel.* Wilson v. Preston, 173 Ohio St. 203, 181 N.E.2d 31 (1962); State *ex rel.* Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947); Ley v. Kirtley, 5 Ohio N.P. (n.s.) 529, 18 Ohio Dec. 280 (C.P. Summit Cty. 1907).

²¹ Columbia Life Ins. Co. v. Hess, 28 Ohio App. 107, 162 N.E. 466 (Ct. App. Hamilton Cty. 1926), *aff'd*, 116 Ohio St. 416, 156 N.E. 504 (1927).

²² American Life & Accident Ins. Co. v. Jones, 53 Ohio L. Abs. 161, 83 N.E.2d 408 (Ct. App. Franklin Cty. 1948), *modified on rehearing*, 53 Ohio L. Abs. 412, 85 N.E.2d 593 (1948), *aff'd*, 152 Ohio St. 287, 89 N.E.2d 301 (1949).

²³ Baldwin Forging & Tool Co. v. Griffith, 5 Ohio N.P. (n.s.) 566, 18 Ohio Dec. 261 (C.P. Franklin Cty. 1907).

²⁴ State *ex rel.* Nichols v. Gregory, 130 Ohio St. 165, 198 N.E. 182 (1935); Shade v. Ferguson, 44 Ohio L. Abs. 332, 62 N.E.2d 642 (Ct. App. Franklin Cty. 1945).

²⁵ 5 Ohio St. 2d 248, 215 N.E.2d 394 (1966).

²⁶ *Id.*; Board of Educ. v. Volk, 72 Ohio St. 469, 74 N.E. 646 (1905).

trine.²⁷ The constitutions of 1803 and 1851 made no mention of sovereign immunity, and no statutes covered the subject. However, case law shows that the doctrine existed in Ohio as early as 1840,²⁸ and statutes granting consent to suit imply that it existed even earlier.²⁹ No supreme court opinion expressly adopted or created the doctrine. Rather, when the doctrine appeared in opinions of the supreme court, it was as an established, settled principle which the court apparently thought needed neither comment, justification, nor explanation.³⁰ The doctrine thus appears to have been adopted long before these opinions, probably along with the adoption of the English common law in the time of the creation of the Northwest Territories.³¹

The Ohio Supreme Court has, at different times, given various explanations for the basis for sovereign immunity in Ohio. Perhaps the earliest explanation of the doctrine in supreme court opinions appeared in *Dayton v. Pease*,³² in which the court based the doctrine on a policy decision

²⁷ *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972); *Schaffer v. Board of Trustees*, 171 Ohio St. 228, 168 N.E.2d 547 (1960).

²⁸ *State v. Franklin Bank*, 10 Ohio 91 (1840) involved a suit by the state against a bank for back taxes owed from a previous year. The bank claimed a right to a refund from another year in an amount greater than the amount owed. When requested to render judgment against the state for the difference, the supreme court declared simply, "This we cannot do," without elaborating, *Id.* at 100. The syllabus of the case reads in pertinent part: "No judgment can be rendered against the state."

In a civil action, the defendant may set off a debt due to him from the state." Sovereign immunity was obviously the basis of the court's holding. However, the granting of the setoff suggests that the state was liable for the excess of the refund claimed over the amount owed.

In *Miers v. Zanesville and Marysville Turnpike Co.*, 11 Ohio 273, 274 (1842), regarding sovereign immunity, the court said only: "To so much of the bill as assumes to compel the state to pay arrearages of its subscription, it is plain that no answer need be made; it is enough to say that the state is not, in fact, a party, and is not capable of being made a party defendant." The syllabus reads in pertinent part: "No suit lies against the state to compel the payment of subscription to stock."

²⁹ *E.g.*, An Act to carry into effect the acts heretofore passed for the relief of James Hampson and John S. Parkinson, 36 Ohio Laws (Local) 169 (1838), construed in *Hampson and Parkinson v. State*, 8 Ohio 315 (1838); An Act for the relief of Morris Seely, 36 Ohio Laws (Local) 220 (1839), construed in *Seely v. State*, 11 Ohio 501 (1842), *aff'd on rehearing*, 12 Ohio 496 (1843). The fact that it was necessary for the General Assembly to pass special statutes in order to allow claimants to seek redress in the courts indicates that the doctrine of sovereign immunity already at that time precluded suits against the state without its consent.

³⁰ See note 27, *supra*.

³¹ The English common law was introduced in Ohio in 1795, prior to statehood, in a law adopted by the Governor and judges of the Northwest Territory pursuant to authority given them by the Northwest Ordinance of 1787. LAWS OF THE TERRITORY OF THE UNITED STATES NORTH-WEST. Although it was repealed on January 2, 1806 (4 Ohio Laws 38), the English common law is still a part of the common law of Ohio "so far as it is reasonable in itself, suitable to the condition and business of our people, and consistent with the letter and spirit of our federal and state constitutions and statutes . . ." *Bloom v. Richards*, 2 Ohio St. 387, 390 (1853).

³² 4 Ohio St. 80 (1854).

that redress against the state should be a matter of legislative grace rather than a matter of right in the courts. In a later case, *State ex rel. Parrott v. Board of Public Works*,³³ the court relied on the common law doctrine that "The King is not bound by any statute, if he be not expressly named to be so bound," stating that the maxim applied "to states in this country as well . . . because it must be assumed that the state will ever be ready and willing to act justly toward its citizens in the absence of statutes or the intervention of courts."³⁴ Only once (and then only in passing) has the supreme court found the origin of Ohio sovereign immunity in the often-cited ancient maxim "the King can do no wrong." Since this maxim is widely regarded as being misstated and misunderstood, the court's lack of reliance on it appears to be well founded.³⁵

³³ 36 Ohio St. 409 (1881).

³⁴ *Id.* at 414-15.

This rule of statutory construction, that the state is not bound by a general statute unless it is expressly named in it, provides an explanation for immunity from liability as well as immunity from suit. It appears to be the main reason why the courts have not found general jurisdictional and procedural statutes to be consents to suit, and thus it is one of the main reasons why the doctrine of sovereign immunity exists in Ohio today. In *Palumbo v. Industrial Commission*, 140 Ohio St. 54, 42 N.E.2d 766 (1942), the supreme court stated that the state's consent to suit must be express, not implied, citing the *Parrott* case and the legal maxim quoted in it. Although this general rule of construction would be sufficient in itself to preclude the state from liability on causes of action based upon statutes not expressly including the state, it has a broader impact. Because Ohio trial courts have only such jurisdiction as is conferred upon them by the Constitution or statutes, *Humphrys v. Putnam*, 172 Ohio St. 456, 178 N.E.2d 506 (1961), a general jurisdictional statute would not give a court jurisdiction of an action against the state.

³⁵ See, e.g., *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Thacker v. Board of Trustees*, 35 Ohio St. 2d 49, 73-75, 298 N.E.2d 542, 556-57 (1973) (Brown, J., dissenting); Comment, *Ohio Sovereign Immunity: Long Lives the King*, 28 OHIO ST. L. J. 75 (1969). See also the Reply Brief for Defendant-Appellant at 31 n.2, *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), where counsel for the state wrote:

Interestingly enough, the concept that "the King can do no wrong" did not arise until centuries after the doctrine of sovereign immunity had introduced itself into European jurisprudence. It was early recognized that the King could act illegally and there was "a definite legal remedy against the crown"—the petition of right. 9 Holdsworth, *History of English Law* 16 (1926). See generally pp. 7-43. The petition was regarded not as a matter of grace, but as a true legal remedy, and the difference between it and a court action against the King was "only in the form, not in the thing." Justice Wilson in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 459, 1 L. Ed. 440 (1793).

The Tudor and Stuart lawyers, eager to enhance the power of the King, gave a new twist to the established maxim that the King could not be sued, and introduced in English law the theory of an absolute monarchy, independent of and untrammelled by the law. 9 Holdsworth, *History of English Law* 4-7 (1926). It was this era, replete with heated confrontations between Henry VIII and the Church of Rome, which gave voice to the ill-famed doctrine that "the King can do no wrong." In actuality, this theory was dealt its death blow and should have been laid to rest when Parliament forced Charles II to grant a petition of right—the Petition of Right of 1628, in which Charles recognized that he was bound to respect the legal rights of his subjects. Adams, *Constitutional History of England* 293-297 (2nd Ed. 1934). Some of the parliamentary lawyers, however, notably Blackstone, simply

It was not until *Krause v. State*,³⁶ in 1972, that the supreme court articulated what must have long been a prime consideration in the court's reluctance to abrogate the doctrine of sovereign immunity: the constitutional separation of powers which gives the legislature the sole power to appropriate funds.³⁷ If the courts were to discard sovereign immunity on their own, without provision being made by the legislature for payment of the judgments, "courts would render judgments which would be constitutionally uncollectible unless or until the General Assembly made an appropriation, or the plaintiff brought suit, in aid of execution, against the General Assembly."³⁸ The result would be a confrontation between the separate and coequal branches of the state government, with the courts arguably invading the exclusive province of the legislature. Avoidance of the possibility of such a clash is the soundest reason for the continuance of sovereign immunity in the absence of consent to suit by the legislature.

C. *Remedies Against the State of Ohio before 1917*
and Article I, § 16 of the Ohio Constitution

Prior to the establishment of the sundry claims procedure in 1917, if a person felt aggrieved by the state in some way, the only remedy available was a petition to the legislature for redress. If the General Assembly was persuaded of the merit of the claim, it would pass a special statute. Generally such statutes would do one of three things: (1) authorize or order the state treasurer³⁹ or treasurer of the political subdivision involved to pay the amount claimed;⁴⁰ (2) authorize or require agencies with special funds to investigate the claim and pay any amount found due;⁴¹ or (3) grant special permission to the claimant to sue the state in a court of law.⁴² Special statutes granting consent to sue the state were

transferred the seat of absolutism from King to Parliament, *See Chisolm*, *supra*, 2 U.S. at 462. And our law has ever since been troubled by a confusion between the theory of sovereign immunity from suit, and the theory that the sovereign is absolute and independent of the law.

³⁶ 31 Ohio St. 2d 132, 143, 285 N.E.2d 736, 743 (1972).

³⁷ Ohio Const. art. II, § 22 provides in pertinent part: "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law . . ."

³⁸ 31 Ohio St. 2d 132, 143, 285 N.E.2d 736, 743 (1972).

³⁹ *E.g.*, An Act for the relief of Caleb Atwater, 36 Ohio Laws (Local) 305 (1838).

⁴⁰ *E.g.*, An Act for the relief of Rezin Arnold, 22 Ohio Laws (Local) 83 (1824) (requiring the treasurer of Harrison County to pay not more than \$75 to Rezin Arnold for services rendered in the case of *Ohio v. John Wallace*).

⁴¹ *E.g.*, An Act for the relief of James Hampson and John S. Parkinson, 33 Ohio Laws (Local) 309 (1835).

⁴² *E.g.*, An Act for the relief of Morris Seely, 37 Ohio Laws (Local) 220 (1839), *construed in* *Seely v. State*, 11 Ohio 501 (1842), *aff'd on rehearing*, 12 Ohio 496 (1843); An

rare and were interpreted variously depending upon their specific language.⁴³ When relief was sought by means of special claims statutes the claims generally were first submitted to the finance committee of the legislature and then, if approved, were subject to legislative and executive approval or disapproval in the same manner as other bills.

This system often depended upon the influence of the claimant or the sympathy which he could arouse. It was open to much abuse and was openly criticized at the Ohio Constitutional Conventions of 1850 and 1912.⁴⁴ The 1912 Convention voted to propose an amendment to article I, § 16 of the Ohio constitution by adding that "Suits may be brought against the state, in such courts and in such manner as may be provided by law."⁴⁵ The amendment was approved by the voters at a special election held in 1912.

In 1917, in *Raudabaugh v. State*,⁴⁶ the supreme court held that the

Act for leave to sue the state of Ohio, to adjudicate a claim of Miss Ellen Hunt, 102 Ohio Laws (Local) 174 (1911), construed in *Hunt v. State*, 20 Ohio C.C.R. (n.s.) 111 (Cir. Ct. Cuyahoga Cty.) *aff'd*, 88 Ohio St. 599, 106 N.E. 1062 (1912).

⁴³ One statute provided that the "suit in chancery, . . . , shall be investigated and decided by said court upon the principles of justice and good faith, and upon the final hearing of the cause, upon the principles aforesaid, the court shall render such decree as, in their opinion, the principles of justice and good faith demand." An Act for the relief of Morris Seely, 37 Ohio Laws (Local) 220 (1839). This statute was interpreted by the supreme court not to require that the plaintiff establish a legal or equitable right to relief, but to place his right to relief on "the principles of a more enlarged rule of moral right, untrammelled by technical rules." *Seely v. State*, 11 Ohio 501, 506 (1842), *aff'd on rehearing*, 12 Ohio 496 (1843). On the other hand, a much later statute which merely provided that the plaintiff "is hereby permitted and empowered to commence an action in the Court of Common Pleas of Cuyahoga County against the state of Ohio, that the said claim . . . may be properly determined," An Act for Leave to sue the state of Ohio, to adjudicate a claim of Miss Ellen Hunt, 102 Ohio Laws (Local) 174 (1911), was interpreted by the Cuyahoga County Court of Appeals to require that the validity of the plaintiff's claim be "determined by reference to established legal principles." *Hunt v. State*, 20 Ohio C.C.R. (n.s.) 111, 112 (Cir. Ct. Cuyahoga Cty. 1912).

⁴⁴ At the 1850 Convention one delegate said:

We are all aware that claims are submitted to the legislature, about which we have no means of ascertaining whether they are correct or not, because the evidence we have is merely *ex parte*. The allowances depend generally more upon the men who advance the claims than the justice of the claims. . . . Claims have been brought here which parties would never think of applying to a court to enforce. . . . Of all bodies in the world the Legislature is the poorest to settle disputes about claims.

1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1850 297 (1850).

At the 1912 convention another delegate characterized adjustment of claims by the legislature as "a settlement based upon charity and doubt" and questioned, "why should the legislature appropriate the peoples' money in settlement of claims against the state of dubious and uncertain origin and without the intervention of the courts?" 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1431 (1912).

⁴⁵ 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1431 (1912).

⁴⁶ 96 Ohio St. 513, 118 N.E. 102 (1917).

amendment is not self-executing and that until the legislature enacts a statute expressly granting consent to suit, the state is not subject to suit in Ohio courts.⁴⁷ In 1972, this interpretation was reaffirmed by the court in *Krause v. State*.⁴⁸ The legislature's consent to suit, the court said in *Krause*, "is manifest when it designates, by law, the courts and the manner in which such suits may be brought."⁴⁹

Implicit in the supreme court's opinions in *Raudabaugh* and *Krause* is the notion that the grant of power to designate the courts in which suits may be brought also includes the right not to exercise that power. That right amounts to a legislative veto over the right to sue the state granted by the amendment. Thus Ohio courts are without power to abrogate the doctrine of sovereign immunity,⁵⁰ though it may be waived totally or partially by the legislature at any time. "[S]overeign immunity exists in Ohio, insofar as suits against the state are concerned, only because the constitutional requirement for legislative consent in the field has not yet been satisfied."⁵¹

⁴⁷ Although the result of the decision, continuation of sovereign immunity, is open to criticism; the decision follows logically from the language of the constitution. A constitutional provision is self-executing if its terms indicate that it is operative without supplemental or enabling legislation, *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 101 N.E.2d 289 (1951), that is, if it provides the means by which the right given may be enforced, *Strange v. Cleveland*, 94 Ohio St. 377, 144 N.E. 266 (1916). The supreme court's conclusion that the 1912 amendment is not self-executing follows from the definition of self-executing, since the provision's reference to "such courts and such manner as may be provided by law" makes it clear that the framers envisioned legislation to designate the courts having jurisdiction over such suits and to prescribe the procedure for bringing such suits. So until the legislature produces such legislation, no courts have jurisdiction over suits against the state, and no such suits may be brought.

⁴⁸ 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972).

⁴⁹ 31 Ohio St. 2d at 144, 285 N.E.2d at 743.

⁵⁰ *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972); *Schaffer v. Bd. of Trustees*, 171 Ohio St. 228, 168 N.E.2d 547 (1960).

⁵¹ *Thacker v. Bd. of Trustees*, 35 Ohio St. 2d 49, 54, 298 N.E.2d 542, 545 (1973). One may logically question why the framers of the 1912 constitutional amendment proposed it at all if it had no practical effect on the law except to elevate the state's immunity to a constitutional principle voidable at the legislature's will. The answer is found in the concepts of constitutional law which were voiced at the 1912 constitutional convention, but which were never adopted by the courts of Ohio. The major proponent of the amendment, in a long speech at the convention, cited a treatise by Judge Cooley, a constitutional law scholar of the late 19th century, from which the delegate concluded that the legislature needed constitutional authority to "enact laws that seek to nullify the immemorial rights of sovereignty" such as sovereign immunity. 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1431 (1912). At the time, there was a school of thought which considered sovereign immunity an inherent right of the sovereign, the sovereign being not the legislature but the people, and maintained that the legislature needed a constitutional grant of power from the people in order to allow suits against the state without the legislature's consent to each individual suit. It was thought that the legislature could grant the state's consent to individual suits, but that it could not do away with the requirement for consent to each suit by granting a court continuing jurisdiction over such suits, without first being constitutionally empowered to do so. Since sovereign immunity was considered an inherent right of the people and not as a judicial doctrine

II. THE SUNDRY CLAIMS BOARD

Shortly after the 1912 ratification of the amendment to article I, § 16 of the Ohio constitution, the legislature attempted to implement it by considering broad consent statutes. One such statute passed the General Assembly, but was vetoed by the governor.⁵² Three others were rejected by the legislature.⁵³ Against this background the General Assembly in 1917 enacted what is now Ohio Revised Code § 127.11, which created the Sundry Claims Board and empowered it to hear and approve claims against the state.⁵⁴ This portion of the note will discuss the present practices and procedure of the Board in order to better analyze the provisions of the proposed Court of Claims Act.⁵⁵

A. *The Composition of the Board*

According to the statute establishing it, the Sundry Claims Board consists of five members: the state auditor, the attorney general, the chairman of the House finance committee, the chairman of the Senate finance committee, and the director of the state office of budget and management or an employee appointed by him.⁵⁶ The statutory members seldom sit in person. Instead they designate representatives to sit in their place,⁵⁷ with these representatives often changing from hear-

which could be abrogated on policy grounds, the framers of the 1912 amendment had no idea that they were making the doctrine any more invulnerable than it already was when they granted the legislature the power to provide for suits against the state, a power intended to facilitate the waiver of sovereign immunity. The Ohio Supreme Court has referred to this method of granting the power to the legislature as "the prevailing constitutional procedure at that time." *Krause v. State*, 31 Ohio St. 2d 131, 138, 285 N.E.2d 736, 740 (1972).

⁵² H.B. 382 passed unanimously in the House, 102 OHIO H. JOUR. 1178-79 (April 18, 1913), and in the Senate, 103 OHIO S. JOUR. 767 (April 18, 1913), but was vetoed by Governor Cox because he thought it "a crudely drawn and unwise piece of legislation." Ohio Hist. Soc'y Arch., Gov. Papers, Gov. Cox's Veto Message (May 2, 1913). The General Assembly never got a chance to override the veto since it had adjourned for the year on April 18.

⁵³ H.B. 382 which was introduced February 17, 1913, apparently died in the committee to which it was assigned. 103 OHIO H. JOUR. 1498 (1913). H.B. 32 which was introduced on January 14, 1915, also apparently died in the committee to which it was assigned. 106 OHIO H. JOUR. 1610 (1915). H.B. 107 which was introduced January 20, 1915 was indefinitely postponed on February 4, 1915. 106 OHIO H. JOUR. 169 (Feb. 4, 1915).

⁵⁴ 107 Ohio Law 532 (1917).

⁵⁵ This portion of the note draws upon the familiarity of one of the authors, Thomas Kahle, with the workings of the Sundry Claims Board gained by working as clerk to the Board. The authors are also indebted to Charles Whetstone, a former Law Journal staff member and also a former clerk to the Sundry Claims Board, for his initial research and ideas on this topic which have been incorporated in this note.

⁵⁶ OHIO REV. CODE ANN. § 127.11 (Page 1969). In 1973, the Department of Finance was changed to the Office of Budget and Management and all references in the statute have been changed by the legislature to reflect this.

⁵⁷ The chairmen of the House and Senate finance committees sometimes sit in person,

ing to hearing.⁵⁸ Thus it is uncommon for the same five members to act for consecutive hearings and, consequently, for any one member other than the president to develop substantial experience.⁵⁹ The custom of designating alternates is especially awkward when the board hears complicated claims requiring several days for a full hearing or when a claim is continued for submission of briefs.⁶⁰ In such cases the members who vote on the claim may be different than the members who attended the hearing or who read the briefs. Even the "proxy" procedure sometimes used in such cases hardly serves to correct the deficiency.⁶¹

The statutory membership itself creates more subtle problems. All of the members are in some respect political, either because they are elected officials themselves or because they are selected, directly or indirectly, by elected officials.⁶² Moreover four of the five members are among those officials most concerned with guarding the expenditure of public funds. This has been seen as an effort to cut down the amount and number of damage awards.⁶³ While the fifth member (the Attorney General) is not directly connected with fiscal matters, his participation in Board hearings represents another problem. The Attorney General's office represents the state's interest in any legal proceeding which involves the state.⁶⁴ This includes defending the state before the Sundry Claims Board. Thus the representative of the Attorney General sits in judgment on the presentation made by a co-worker in the same office.

but the auditor and attorney general never do. The director of the Office of Budget and Management appoints one person who always sits. In 1963 the statute was modified to permit alternative members to be appointed for the chairmen of the House and Senate finance committees. 130 Ohio Law 58 (1963). However, the statute contains no such authorization for the auditor and attorney general. Despite the lack of statutory authorization the practice appears to be one of long standing and has not been challenged.

⁵⁸ On occasion the composition of the Board has changed even during a hearing.

⁵⁹ In May 1973 while testifying on the bill, the President of the Sundry Claims Board stated that although he had only a little over a year's experience on the Board, that short length of time gave him more experience than any other Board member except the auditor's representative. Statement of Joel S. Taylor, President of the Ohio Sundry Claims Board, on House Bill No. 800, before the judiciary committee of the Ohio House of Representatives, May 30, 1973, at 3. [Hereinafter cited as Statement of Joel S. Taylor.]

⁶⁰ Statement of Joel S. Taylor at 4.

⁶¹ Because an alternate member did not hear the evidence on a particular claim he is incapable of contributing to the Board's deliberation in a meaningful way. Moreover, because he is just a "proxy" there is little possibility that he may be persuaded to change his vote even where the person for whom he sits would have been willing to do so.

⁶² Administrative claims boards frequently are criticized because it is felt that their awards are influenced by political pressure. See, e.g., Oberst, *The Board Of Claims Act of 1950*, 39 KY. L.J. 35, 41 (1950); 44 HARV. L. REV. 432, 435 (1931).

⁶³ Comment, *Ohio Sovereign Immunity: Long Lives the King*, 28 OHIO ST. L.J. 75, 87 (1968).

⁶⁴ OHIO REV. CODE ANN. § 109.02 (Page 1972).

This may put the claimant at a subtle disadvantage when close questions are before the Board.

In addition to causing a possible bias against the claimant and in favor of the state, the other full-time duties of the Board members give "Board proceedings a part time quality which must detract from just decision making."⁶⁵ The Board members "can never devote the time to [claims] which would be done by a court."⁶⁶ This overload of responsibilities has lead to a situation in which not all the members are fully prepared for the hearings. Often members can be seen reading the claim forms or briefs for the first time at the hearing itself.

The other full-time duties of the Board members reflect one additional shortcoming. Although the Board purports to make decisions on solely legal considerations there is no requirement that Board members be legally trained.⁶⁷ Thus members of the Sundry Claims Board may be incompetent even to understand a sophisticated legal argument, much less to apply it properly to the facts before them.

B. *Jurisdiction of the Board*

The Sundry Claims statute empowers the Board to entertain "claims against the state," a phrase which has created serious jurisdictional problems and uncertainties. The primary limitation of this phrase concerns its application to local political subdivisions of the state. The Board has consistently held that it has no jurisdiction over such local units as school districts, conservation districts, and so forth.⁶⁸ This interpretation of the statute has been based primarily on the assumption that, since Sundry Claims awards are paid only from funds in the state treasury, the legislature must not have intended that these funds be used to pay for wrongs committed by local political units, which are separately funded.⁶⁹ Since

⁶⁵ Statement of Joel S. Taylor at 4.

⁶⁶ *Id.* at 3.

⁶⁷ Although the President of the Board has traditionally been an attorney, only the representative of the attorney general will definitely be legally trained. He "was added to the Board, no doubt, to protect against the embarrassment of making awards where the legal grounds were thin." *Id.* at 3.

⁶⁸ See Sundry Claim No. 15124, Rickie Lee Green (August 17, 1973), and the claims cited therein.

⁶⁹ This view is supported by legislative action in other areas. Various Ohio statutes provide that counties may under certain circumstances be held liable at law for damages caused by them, and these statutes place the responsibility for payment of damages on the counties themselves. OHIO REV. CODE ANN. § 305.12 (Page 1953) (bridge maintenance); OHIO REV. CODE ANN. § 307.47 (Page 1953) (certain damage by county police officers). On occasion special legislation has passed requiring certain counties to reimburse from their own funds a citizen injured by the county's negligence. *E.g.*, 112 Ohio Laws 102 (1927), construed in *Spitzig v. State ex rel. Hile*, 119 Ohio St. 117, 162 N.E. 394 (1928). It

these units are not subject to state executive control and would not have to *pay* the awards, there would be no reason for the local units to curb their negligent behavior or to defend their action before the Board.⁷⁰ The only court case concerning the Board's jurisdiction appears to affirm this limitation on the Board's power to review the tortious acts of local political units which are otherwise immune from liability.⁷¹

The limitation of the Board's jurisdiction to "claims against the state" forces the parties into multiple litigation in cases in which there are more claims involved than the one asserted by the claimant. For instance, it deprives the state of the right to counterclaim against the claimant, or to implead third parties, since the use of counterclaims or third-party practice would require the Board to pass on legal duties of parties other than the state, parties over whom the Board has no jurisdiction.⁷² Consequently, this limitation will sometimes force the state to be a defendant before the Board and then to become a plaintiff in a separate action in a court of law.

C. Sundry Claims Board Procedure

The Board is empowered to receive "papers representing claims against the state."⁷³ Presently the Board implements this provision by receiving claims on a special form, forwarding one copy of the claim to the state agency involved, and requesting that the "defendant" agency investi-

should also be noted that the state is generally forbidden to assume the debts of any county, city, town, township or corporation by article VIII, § 5 of the Ohio Constitution.

⁷⁰ See Sundry Claim No. 15124, Rickie Lee Green (August 17, 1973) at 3-4.

⁷¹ In 1973, a mandamus action was filed in the Ohio Supreme Court to compel the Board to take jurisdiction of a claim involving a local school district. *State ex rel. Rickie Lee Green v. Sundry Claims Bd.*, No. 73-767 (Ohio Sup. Ct., Dec. 13, 1973). In support of its motion to dismiss, the state argued in the alternative (1) that a claim against a municipal board of education is not a "claim against the state" under the terms of the sundry claims statute and (2) that the sundry claims statute, by providing that the Board "may receive original papers representing claims against the state" (emphasis supplied), imposes only a permissive and discretionary jurisdiction upon the Board and not a mandatory obligation to consider any particular claim against the state. Memorandum in Support of Defendant's Motion to Dismiss. The supreme court granted the state's motion to dismiss, stating only that the "plaintiff does not show any clear legal duty on defendants to act." However, the court did not specify whether the finding of no clear legal duty was based on a lack of jurisdiction on the part of the Board or on a grant of discretion in the statute. While this ambiguity deprives the case of any broad value as a precedent, it does make it clear that the Board does not have to consider claims against local political entities. Thus, the decision leaves those injured by certain negligent acts of such entities without any effective recourse.

⁷² Counsel for the state once urged the Board to accept the principle of setoff. Although the application of this principle results only in a reduction of the state's liability rather than in an affirmative award against the state, the Board refused to consider setoffs for the same reason that it does not permit counterclaims or third-party practice. Sundry Claim No. 14528, Earl E. Lockwood (Aug. 8, 1972).

⁷³ OHIO REV. CODE ANN. § 127.11.

gate the claim and submit a report to the Board. After receiving the report, the Board forwards a copy of it to the claimant⁷⁴ and schedules the claim for a hearing. In claims under \$1,000, unless the claimant requests otherwise, the hearing is restricted to a private consideration based on the forms alone, with no witnesses testifying and no additional evidence taken. A full adversary hearing is held on claims over \$1,000. This seemingly simple procedure is fraught with limitations which reduce the ability of the claimant to receive an equitable disposition of his claim.

There are no rules of pleading as such. The Board requires only that the claim be submitted on a special form⁷⁵ and that the statement of the claim be specific enough for the Board to determine what the alleged wrong is and which state agency is involved. All claims are returned to the claimant by the Board until these minimal requirements are met.

The investigation of the claims causes several difficulties. Although empowered to investigate all claims, the Board lacks the budget and staff to investigate the approximately 500 claims filed annually.⁷⁶ Instead the Board relies almost exclusively on the state agency involved. However, there is no limit to the amount of time which an agency may take to investigate a claim. There is no default judgment procedure, no means of forcing the departments to investigate the claims,⁷⁷ and indeed little incentive for them to do so.⁷⁸ Since the Board rarely schedules a hearing without the investigation report, an unconscionable delay may result. While most state departments cooperate with the Board, a few departments have a substantial backlog,⁷⁹ and some claimants have waited as long as four years for their claims to be investigated.⁸⁰

⁷⁴ This is a relatively recent innovation. Prior to 1972 the claimant had no knowledge whatsoever of the state's position prior to the hearing.

⁷⁵ The Board requires that claim papers be in affidavit form and that five copies of the claim and all supporting documents be filed. Forms are provided for claims for property damage, personal injury, contract refund, unpaid bills, and miscellaneous damage claims. There are no fees for filing a claim, and no costs are charged to claimants, even if unsuccessful.

⁷⁶ Apparently the Board did at one time employ an investigator. See Walsh, *The Ohio Sundry Claims Board*, 9 OHIO ST. L.J. 437, 441 (1948). It employs none now.

⁷⁷ The President of the Board has the power to subpoena witnesses, books, and papers. OHIO REV. CODE ANN. § 127.11. Conceivably he could issue a subpoena duces tecum to the head of the state agency involved, but this is highly unlikely.

⁷⁸ See text accompanying notes 110 to 113 *infra*.

⁷⁹ The Department of Rehabilitation and Correction, for example, as of December 1973 had at least fifty claims pending against it, some dating back to 1970.

⁸⁰ In 1972 there were some claims filed as long before as 1968 which had not yet been investigated. An extreme example of this unconscionable delay occurred in 1973 when the Board after receiving an investigation report found that the claimant had been dead for over a year and a half. Sundry Claim No. 14191, Nick J. Pantaleo (dismissed Aug. 10, 1973).

Even when an investigation report is promptly returned it is often still inadequate. The claim forms and investigation report constitute an archaic form of pleading which possesses the simplicity of pleading under the civil rules, but not the sophistication. They often are totally insufficient to adequately inform the Board of all relevant facts on small, simple claims, much less on complex cases involving substantial sums of money. Standing alone they frequently fail to isolate the issues in controversy. This uncertainty is compounded by the lack of any discovery or pre-hearing conferences. The lack of discovery puts the claimant at a disadvantage which the civil law rejected long ago. This is especially true of complex contract claims in which the state may keep important information from the claimant by simply not volunteering it.⁸¹ Because of the lack of discovery, parties are often surprised at the direction and substance of the evidence at a hearing. Nonetheless, they are expected to produce their entire case at the hearing.⁸²

The hearings themselves are short, informal, and "adversary" in nature. Although the procedure contains "some of the trappings of judicial proceedings,"⁸³ hearings seldom resemble a trial in a court of law. Each party is given the opportunity to argue his case, to present witnesses⁸⁴ and to cross-examine the opposing party's witnesses. The Board does not fully adhere to the rules of evidence. Hearsay evidence as well as any other information tending to shed light on the claim is admitted. Although there is no requirement that a claimant be represented by counsel,⁸⁵ chances of recovery undoubtedly improve when the claimant has an attorney to present his claim. This is especially true since the state department or other agency involved will normally be represented by an assistant attorney general or special counsel.

If the claims were to proceed in a court of law, undoubtedly many claimants, especially those having tort claims, would secure counsel on a

⁸¹ For example, Sundry Claim No. 15042, *M. B. Guran Co.* (July 20, 1973), depended solely upon the interpretation of one clause in a highway construction contract between the claimant and the Department of Highways. Had discovery been available the claimant's attorney undoubtedly would have been able to produce evidence concerning the use and interpretation of the clause in other highway contracts if such evidence existed. However, the claimant was forced to present his case without such evidence and the department was allowed to defend without ever producing evidence of how the clause had been interpreted in other contracts. The claimant prevailed however, and the Board recommended an award of \$129,010.39.

⁸² Occasionally a claimant's attorney will mitigate the effects of lack of discovery by requesting that the President issue a subpoena duces tecum to an important witness.

⁸³ Statement of Joel S. Taylor at 4.

⁸⁴ The parties have the right to petition the President to subpoena witnesses and documents. OHIO REV. CODE ANN. § 127.11.

⁸⁵ Most claimants with claims over \$1,000 are represented by counsel; most claimants with claims for a lesser amount are not.

contingent fee basis. However, it is illegal for any attorney to represent a claimant before the Sundry Claims Board on this type of fee arrangement.⁸⁶ If a contingent fee is used, both the attorney and his client may be subject to prosecution resulting in a fine, or imprisonment, or both.⁸⁷ In theory it can be argued that this provision deprives certain poor claimants of an opportunity to be represented by counsel, and thus decreases the number and amount of damage awards made by the Board.⁸⁸

D. *Applicable Legal Standards in Claims Before the Board*

The Board has consistently held that the claimant must prove his claim by a preponderance of the evidence, just as he would in a civil case. While the statute does not specify what a claimant must prove to recover, as a general rule the Board has required that claimants establish a valid cause of action against the state. That is, a claimant must establish facts which would permit him to recover damages against the state in a court of law if there were no sovereign immunity.⁸⁹ Moral claims are not considered.⁹⁰ Although not expressly required to do so by the statute, the

⁸⁶ OHIO REV. CODE ANN. § 101.76 provides:

No person, firm, corporation, or association shall be employed with respect to any matter pending or that might legally come before the general assembly or either house thereof, or before a committee of the general assembly or either house thereof, for a compensation dependent in any matter upon the passage, defeat, or amendment of any such matter, or upon any other contingency in connection therewith.

The section is part of the anti-lobbying provision of the Ohio Revised Code. While there may be substantial doubt as to whether the legislature intended the prohibition to apply to hearings before the Sundry Claims Board, Board hearings are within the literal ambit of the statute since any award in excess of \$1,000 must be approved by the General Assembly. Any doubt as to the section's applicability to sundry claims was removed by two 1927 Ohio Attorney General opinions which interpreted the statute to cover attorneys who represented claimants before the Sundry Claims Board on a contingent fee basis. 1927 OP. ATT'Y GEN. 1665; 1927 OP. ATT'Y GEN. 2024.

⁸⁷ Under OHIO REV. CODE ANN. §§ 101.78 and 101.79, both the attorney who violates the section and his client are subject to prosecution which could result in fines of \$200 to \$5,000 or imprisonment for one to two years, or both.

⁸⁸ The argument rests on the premises that attorneys are aware of and follow the provision, a premise that is probably not factually correct.

⁸⁹ See Sundry Claim No. 15050, Frank Johns (September 7, 1973) at 2.

⁹⁰ However, the Board arguably does occasionally grant an award in which no definite legal theory is apparent. See, e.g., Sundry Claims No. 14495, John W. Simon; No. 14591, Ernest W. Teodosio; No. 14786, C. D. Lambrose; No. 14787, Delmar A. Christensen; No. 14496, Roger Maas; No. 14788, William L. Ziegler; and No. 14497, Matthew McManus (Oct. 13, 1972) which involved claims of attorneys (and some clients) representing Ohio National Guardsmen involved in the 1970 shooting at Kent State University for fees and expenses incurred in connection with investigations of the shootings and in connection with civil actions against the guardsmen. "The Board felt that the guardsmen should not bear the burden of attorney fees since it has not yet been shown that they acted other than within the scope of their authority. The Board found that various officials, none with actual authority to bind the State, represented to the guardsmen, if not the attorney claimants, that the state would pay for employment of private counsel." H.B. No. 988, 110th Ohio Gen. Assembly, Reg. Sess.,

Board has applied Ohio law to determine the extent of any legal duty.⁹¹ With the exception of statutes of limitation⁹² and the collateral benefits rule,⁹³ Ohio substantive law controls all legal questions before the Board. When there is substantial doubt whether a cause of action would exist absent sovereign immunity, Ohio law is of limited use and the Board sometimes refers to the law of those states which have fairly extensive waivers of sovereign immunity.⁹⁴

In those areas where Ohio law is nonexistent or unclear the Board must fashion its own rule of law and apply it to the facts before it. Because of the unique nature of the state's activities, several factual situations which seldom occur in private litigation frequently occur before the Board. In order for a claimant to properly present his claim he must have some means of ascertaining what legal standards will be used by the Board and must be relatively sure that the Board will apply the same rule of law to the same factual situation. In other words, there must be written decisions which are available to the public and which have some precedential effect. This is especially true because there is no controlling body of appellate case law to which the claimant can refer for guidance. Yet only since June 1972 have written decisions been rendered which state the facts and legal conclusions of the claims decided.⁹⁵ Thus there are relatively few written decisions. The few decisions which do exist are kept in such a manner as to be practically useless.⁹⁶ And even when

§ 3, (1973). Although the State would have had no legal obligation to pay the awards even if there were no sovereign immunity, the Board recommended awards from \$250.00 to \$24,797.50.

⁹¹ The Board has applied Ohio law even where it thought the law was arbitrary and unjust. See, e.g., Sundry Claim No. 15026, E. Gilson Mentzer (July 20, 1973).

⁹² The Board generally follows the Ohio statutes of limitation, OHIO REV. CODE ANN. §§ 2305.06 to .11 (Page Supp. 1972) and will deny a claim not timely filed. However, the Board has not inflexibly applied these limits and has considered the merits of late claims when the claimants have shown good cause for the failure to file timely. See Walsh, *supra* note 76 at 442, and OHIO STATE BAR ASS'N., 2 ADMINISTRATIVE LAW SERVICE LETTER No. 1 at 2 (1966).

⁹³ Although the collateral source rule which permits the plaintiff to recover from the defendant the entire amount of his tort damages even though he has received some compensation from collateral source is clearly established in Ohio, *Pryor v. Weber*, 25 Ohio St. 2d 104, 263 N.E.2d 235 (1970), the Board has consistently reduced a damage award by any amount received from a collateral source.

⁹⁴ The Board at times has relied upon the case law of New York, Washington, and Illinois. See, e.g., Sundry Claim No. 15050, Frank Johns (Sept. 7, 1973) at 3-5.

⁹⁵ Previously just the Board's conclusion was given with little or no explanation.

⁹⁶ The statements of fact and decision are public documents which are required by OHIO REV. CODE ANN. § 127.11 to be kept on file at the Office of Budget and Management and are open to inspection within the constraints of OHIO REV. CODE ANN. § 149.43 (Page 1969). However, there is no requirement that the decisions be indexed in any logical manner. Indeed the decisions are kept in chronological order with no subject index, no index by names of defendant departments, no headnotes, and no syllabi. In such a state, the written decisions are practically unusable and will become more so as their volume increases.

a decision on a previous claim is directly in point, there is always substantial doubt whether the Board will follow it. This is especially true in view of the non-legal nature of the Board's members and the fluidity of the Board's composition.⁹⁷

E. *Payment of Claims*

After hearing a claim the Board has the authority to approve or disapprove it.⁹⁸ The Board's action will definitely result in payment only of those claims of \$1,000 or less.⁹⁹ These small claims are paid from a special fund.¹⁰⁰ Claims over \$1,000 must be approved by the legislature as part of the annual sundry claims appropriations bill.¹⁰¹ The bill is prepared by the president of the Board and contains a very short statement of each claim in which the Board recommended an award in excess of \$1,000. The bill goes through the normal legislative process. Hearings are held in both houses and successful claimants are often asked to testify, especially on claims in which members of the finance committee may question the Board's judgment. The committees often make changes in the amounts of the awards, increasing some, decreasing or totally eliminating others.¹⁰²

⁹⁷ From time to time the Board has referred to other claims as having some precedential effect. *E.g.*, Sundry Claim No. 15124, Rickie Lee Green (August 17, 1973); Sundry Claim No. 15072, James Clark (September 7, 1973). It has even gone so far as to "overrule" a previous decision. *See* Sundry Claim No. 15050, Frank Johns (September 7, 1973). On the whole, however, the Board seems extremely reluctant to cite other claims.

⁹⁸ OHIO REV. CODE ANN. § 127.11 provides in part that the Board "shall either approve, approve with conditions and limitations, or disapprove each such claim."

⁹⁹ *Id.* in pertinent part provides:

When any claim filed with it has been approved by the board in an amount of one thousand dollars or less, the auditor of state, upon being presented with a voucher for the payment thereof signed by the president and secretary of the board, shall, if money has been appropriated for the payment thereof, issue his warrant drawn on the treasurer of state in the amount set out in such voucher.

The above provision was added to the sundry claims statute in 1945, but the original limitation was \$200 rather than \$1,000. 121 Ohio Laws 190 (1945). Prior to that amendment, all claims had to be included in the sundry claims appropriations bill. In 1961 the size of claims which could be paid by order of the board was increased to \$1,000. 129 Ohio Laws 451 (1961).

¹⁰⁰ *Id.* in pertinent part provides:

In February of each odd-numbered year beginning 1963, the director of the office of budget and management shall estimate the cost of paying all the claims in an amount of one thousand dollars or less to be allowed by the board during the next succeeding biennium. He shall submit the estimate to the chairman of the finance committee of each house to allow the general assembly to appropriate funds for the payment of claims in an amount of one thousand dollars or less which may be allowed by the board during the next succeeding biennium.

This provision was added to the sundry claims statute in 1961. §129 Ohio Laws 451 (1961).

¹⁰¹ Prior to 1967 a sundry claims appropriations bill was passed by the legislature only biennially; since 1967 such bills have been passed annually.

¹⁰² *See* 135 OHIO H. JOUR. — (June 19, 1973) and note 104 *infra*.

Sundry claims appropriations bills are far more likely to be delayed or defeated than ordinary appropriations bills because the Ohio constitution requires that they be approved by *two-thirds of those elected* to each house rather than the normal *majority of a quorum*.¹⁰³ Interestingly, however, *amendments* to a sundry claims appropriation bill, like amendments to other bills, require only a *majority* to pass. The difference between the votes required to amend the bill and those required to pass it creates unique problems for sundry claims bills. For example, if a majority comprising more than one-half the members present, but less than two-thirds of the total membership, is in favor of deleting a claim the amendment will pass, but the bill will fail as long as the minority insists on retaining the deleted claim. Similarly, if a minority of over one-third disfavours a claim, it will be unable to effect an amendment, but it *can* defeat the bill. This can and has resulted in a situation where several hundred thousand dollars in deserving claims are delayed or denied due to political bickering over a few claims.¹⁰⁴

¹⁰³ OHIO CONST. art. II, § 29 in pertinent part provides:

[N]or shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two thirds of the members elected to each branch of the general assembly.

¹⁰⁴ The 1973 Sundry Claims bill is an excellent example. It encountered almost all the vicissitudes which it is possible for such a bill to encounter in the legislature. As originally introduced in the House, the bill, H.B. No. 988, 110th Gen. Assembly, Reg. Sess. (1973), contained nine contract claims, eight personal injury claims, fifteen property damage claims, one refund claim, one reimbursement claim, three claims for payment for services, two claims for unpaid bills, and ten miscellaneous claims, all claims totalling \$555,160.00. On June 19, 1973, the House amended the bill, adding over six thousand dollars each to two personal injury awards, adding over \$81,000 to a widow's claim for the wrongful death of her husband; deleting two property damage claims against the Division of Highways, adding four property damage claims (which had apparently been approved by the Sundry Claims Board too late to be included in the bill when it was introduced), and deleting the claims of five attorneys for fees for representing Ohio National Guardsmen in hearings stemming from the Kent State shootings. 139 OHIO H. JOUR. — (June 19, 1973). Further amendments were made on the House floor on July 2, 1973. The claims of the National Guardsmen's attorneys and one property damage claim were put back into the bill, and the claims of three ex-state senators for pay for two years of senate membership they lost in 1967 and 1968 when their terms were cut short by reapportionment were deleted. 135 OHIO H. JOUR. — (July 2, 1973). As amended, the bill passed the House by the required two-thirds vote that same day.

On July 10, 1973 the bill as passed by the House was introduced in the Senate and assigned to the finance committee. The finance committee reported the bill out with recommended amendments on July 18, and the Senate passed those amendments at that time. 135 OHIO S. JOUR. — (July 18, 1973). The amendments included: the addition of one personal injury claim and one property damage claim, the replacement in the bill of the claims of the three ex-senators which had been deleted by the House, reduction of the wrongful death claim of the widow from the amount approved by the House to the original amount approved by the Sundry Claims Board, addition of a clause limiting the attorney's fees on the widow's claim to twenty per cent of the award, and deletion of the claim of an attorney for payment for services for representation of the state as special counsel in the prosecution of Lima State Hospital employees for alleged brutality to patients. The

Even if claims have been approved by the Board and both houses of the General Assembly, they still run the risk that the governor will veto the appropriation bill entirely or use his item veto¹⁰⁵ to excise specific claims from the bill.¹⁰⁶ Vetoes of sundry claims appropriations are especially difficult to override since they require a two-thirds vote of each house, rather than the normal three-fifths vote.

The entire process of securing legislative approval of claims over \$1,000 causes unconscionable delay in the payment of claims. If there is any disagreement over the bill's provisions, it may take as long as a year for the bill to pass both houses and be signed by the governor. In addition to this delay there may be a ninety-day delay between the passage of

last amendment was apparently motivated by politics: the Senate is controlled by Republicans, and the attorney was a heavy contributor to Democratic Governor John J. Gilligan's 1970 campaign and was a Democratic nominee for Congress. *Columbus Citizen Journal*, August 30, 1973, at 1, col. 3. The Senate passed the amended bill on July 24 after an attempt to remove the additions failed. 135 OHIO S. JOUR. — (July 24, 1973).

The House refused to accept the Senate amendments to the bill, 135 Ohio H. Jour. — (July 26, 1973), and it was referred to a Senate-House Conference Committee on July 26. The Conference Committee recommended that the Senate's version of the bill be accepted with two changes. The Senate's twenty percent limitation on attorney's fees for the widow's wrongful death claim was to be deleted and in its place a note was to be inserted that the award was "subject to the provisions of Sec. 101.76 of the Revised Code, as applicable." The claims of the three ex-senators were to be deleted again. The House accepted the report and passed the bill in the report's version on August 28. 135 Ohio H. Jour. — (August 28, 1973). However, the Senate vote in favor of the compromise was 18 for and 13 against, and the compromise was defeated for lack of the required two-thirds majority. 135 OHIO S. JOUR. — (August 28, 1973).

The bill was sent to a new Senate-House Conference Committee which recommended the Senate version with the claims of the three ex-senators being reduced from \$16,000 to \$10,000. The House vote on the report was 60 in favor and 30 opposed. Since the votes of two-thirds of the entire membership (66) was necessary for passage, the report failed by six votes. 135 OHIO H. JOUR. — (February 20, 1974). A motion for reconsideration was left pending. 135 OHIO H. JOUR. — (February 21, 1974). A month later the report was reconsidered and defeated by 5 votes. 135 OHIO H. JOUR. — (March 20, 1974).

A third conference committee was then named and that committee recommended the deletion of the three ex-senators' claims. At the last session before a month-long adjournment the Senate agreed to the report by the minimum twenty-two votes required. 135 OHIO S. JOUR. — (April 3, 1973). The House agreed to the report by a vote of 87 to 1. 135 OHIO H. JOUR. — (April 3, 1974). The governor signed the bill April 1974, and because of the emergency clause it became law on that date nearly two years after its introduction.

¹⁰⁵ OHIO CONST. art. II, § 16 in pertinent part provides: "The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void. . . ."

¹⁰⁶ The item veto has been used in the past, for example, on August 20, 1969, Governor James Rhodes used his item veto on the claim of the Armel Construction Company for \$61,860.55 (Sundry Claim No. 13321) and on the claim of the John R. Jurgenson Company for \$4,800.00 (Sundry Claim No. 13646). Am. H.B. No. 830, 108th Ohio General Assembly, Reg. Sess. (1969). 133 Ohio Laws (Appropriations Acts Supp.) 207 (1969). He stated in his veto message that, on the basis of a report submitted to him by the Department of Highways, he concluded that, contrary to what the Board had found, the state did not cause the damage. Veto Message of Gov. Rhodes, 133 OHIO H. JOUR. 1561-62 (September 11, 1969).

a bill and the date it takes effect.¹⁰⁷ Even after the bill goes into effect, it takes four to six weeks for the state to process the paperwork before the claimant actually receives his money.¹⁰⁸ Faced with up to two years delay before they receive their damages, claimants often limit or reduce their claim to \$1,000 in order to guarantee prompt payment.¹⁰⁹

F. *Adversary Parties and Accountability*

A basic principle upon which the Anglo-American system of jurisprudence relies in order to achieve just results is the principle of adversary advocacy. In theory a just result can best be reached by relying on the opposing parties to present and argue the facts and the law before a neutral court and jury. While Sundry Claims Board hearings are often described as "adversary" proceedings, they are so in theory only. Unlike private defendants the particular state department or agency responsible for the alleged harm is in no way held accountable for its action. Claims are paid out of the general revenue fund or some special fund¹¹⁰ and not out of a particular agency's budget. Neither a negligent employee nor a negligent department is directly affected by a claim¹¹¹ and thus neither has any financial incentive to change his behavior.¹¹²

¹⁰⁷ The ninety-day delay can be and frequently is avoided by adding an emergency provision which provides that the law will go into effect immediately upon the governor's signature.

¹⁰⁸ An example of this delay is Sundry Claim No. 13837, Edward E. Jennings (July 28, 1970). In that claim the Board found that the state was responsible for the crushing of four of the claimant's fingers which resulted in their amputation. The Board recommended only an award of \$6,500 even though the President noted in his separate opinion that a jury might reasonably have awarded \$12-15,000 for the same injuries. Because Mr. Jennings' claim was part of a bill which included some controversial claims, Mr. Jennings went nearly two years without being paid the compensation which no one has said should not be paid him.

¹⁰⁹ See, e.g., Sundry Claim No. 14033, Ronald E. Waddell (Aug. 8, 1972), where the Board reduced a recommended award of \$2,400 to an award of \$1,000.

¹¹⁰ For example, certain claims against the Department of Transportation's Division of Highways have been paid from the Highway Fund, certain claims against the Liquor Control Board from the Liquor Control Rotary Fund, and certain claims against the Department of Natural Resources from the Wildlife Fund. See, e.g., 133 Ohio Laws (Appropriation Acts Supp.) 7, 31 (1969).

¹¹¹ Certain departments are indirectly accountable if the claims are paid from a special fund from which the department draws revenues. The only major example is the Department of Transportation, Division of Highways. Claims against the Division of Highways are paid from the Highway Fund from which the legislature appropriates money to the Division for its work. This small element of accountability, coupled with the large sums involved in cases of large highway construction contracts, has led to the most adversary of the proceedings before the Board in which the facts and issues are more clearly brought into focus and the legal issues explained and briefed more thoroughly than in other cases. Such adversariness, however, is the rule in courts of law, rather than the exception.

¹¹² Although it is sometimes asserted that the Board members, in their capacities apart from Board membership, can exert through the budgetary and auditing processes some control over how well an agency performs and can give the head of the department involved an

Because of this lack of financial accountability, the defendant state department or agency may not be a true adversary. Often a particular agency will have no desire to investigate the facts of the claim, brief the legal issues, or argue the state's legal position. Sometimes a department will go so far as to recommend payment of a claim for non-legal reasons such as public relations or moral considerations. Because of this lack of a truly adversary procedure, the Board is sometimes forced either to guess what the facts and applicable law are or to investigate the matter itself; and the Board's staff is inadequate to fully do the latter.¹¹³ Consequently, the Board often makes legal decisions without adequate facts or legal arguments.

This lack of accountability and adversary advocacy is complicated by the fact that there is no means by which a claimant can compromise or settle a claim without formal Board action, even if the state department were for some reason willing to do so. A hearing is required in all cases since only the Board can determine the amount of the award and either authorize its payment (if \$1,000 or less), or recommend that the legislature appropriate money to pay it (if greater than \$1,000). Only if the department admits complete liability for the full amount of damages can a full hearing be avoided. In those cases, if the Board is convinced of the legal and factual validity of the claim, an abbreviated hearing is held. However, the cases in which full liability is conceded are rare, undoubtedly because the state can neither completely avoid a hearing nor save money by admitting liability. Thus many matters which could be compromised and settled out of court in ordinary civil proceedings go to a full hearing before the Sundry Claims Board.

G. *Appeals from Decisions of the Board*

The informal nature of the Board and the absence of procedural guidelines often seem to invite what would be reversible error in a court of law. However, there is no formal appeal from the decisions of the Board, either as a matter of right or as a matter of discretion. "The Board's decision, however arbitrary, however erroneously founded in its

incentive to correct a dangerous practice, Sundry Claim No. 15124, Rickie Lee Green (August, 17, 1973) at 3, this budgetary accountability is more theoretical than real, possibly because, in the process of planning the large budget of a state agency, the agency's needs for funding for its services overwhelms any will of financial officers to use the money as leverage to correct practices producing claims, or possibly because the budgeting officials never consider the problem at appropriations time.

¹¹³ The Board's staff consists of a secretary and a part-time clerk. While the clerk has sometimes been asked to investigate the law and facts on a particular matter, these tasks would undoubtedly be performed much better by an advocate who is paid for representing his client's interests.

legal interpretations, and however based upon faulty fact-finding, is the final word if a claim is dismissed, unless a rehearing can be wangled."¹¹⁴

While the unsuccessful claimant has no recourse,¹¹⁵ successful claimants run the risk that the legislature will not agree with the Board's findings. The state sometimes views the committee hearings as a forum for appeal of claims which it has lost before the Board. Claimants, especially those for whom the Board has approved large awards, run the risk of having their claim deleted from the bill by the legislature. This risk is heightened when only one party, the state, testifies before the legislative committee about a particular claim, and thus is a substantial pitfall to unsuspecting or uncounseled defendants.

III. THE PROPOSED COURT OF CLAIMS ACT, SUBSTITUTE HOUSE BILL NO. 800

The sundry claims system has long been recognized as unfair and inadequate, and there have been frequent calls for statutes granting a broad consent to suits against the state (consent statutes).¹¹⁶ From 1917 to

¹¹⁴ Statement of Joel S. Taylor at 3. A claimant may request a rehearing on any grounds. The Board considers all such requests, but usually grants them only if there is new evidence. Occasionally a claimant who has failed initially will prevail at the rehearing. For example, in Sundry Claim No. 11865, William Hinegardner (Aug. 22, 1972), the Board recommended an award of \$5,300 although the claim originally was denied after the first hearing in November 1965. This claim demonstrates the lack of adequate procedural rules and the resulting injustice which can occur. At the November 1965 hearing the claimant offered evidence to prove that the state had been negligent. After the hearing the state sent evidence of contributory negligence to the Board. Based on this evidence of contributory negligence, to which the claimant had no opportunity to respond, the Board denied the claim in January 1966. At the second hearing, in 1972, the claimant was able to respond to the State's defense and did so successfully.

¹¹⁵ Although the constitutional right to petition for redress of grievances is, of course, always available to the rejected claimant, the legislature appears to have adopted a policy of appropriating funds to pay only claims previously approved by the Sundry Claims Board. This policy is in accord with the main reason for the enactment of the sundry claims statute—the removal of the basic decision as to the validity of claims from the legislature and placing it into the hands of a body less subject to political pressure. See the criticisms of the method of remedying claims by private statutes voiced at the 1850 and 1912 constitutional conventions. 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1850 297 (1850); 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1431 (1912). But this policy has apparently not been followed consistently by the legislature during the whole period of the existence of the Sundry Claims Board, for in 1935 Gov. Martin Davey used his item veto on 54 items in the sundry claims appropriations bill for that year, asserting that some of the items "have been rejected or . . . have not been examined by the Sundry Claims Board." 116 Ohio Laws (Appropriations Acts Supp.) 413 (1935).

¹¹⁶ See 9 OHIO ST. L.J. 491 (1948), and Comment, *Claims Against the State of Ohio: The Need for Reform*, 36 U. CIN. L. REV. 239 (1967), which contain specific proposals, and 1 OHIO STATE BAR ASS'N, 2 ADMINISTRATIVE LAW SERVICE LETTER NO. 1 (1966), and Comment, *Ohio Sovereign Immunity; Long Lives the King*, 28 OHIO ST. L.J. 75 (1967) for proposals of a more general nature.

1974 there were several attempts to enact a broad consent statute,¹¹⁷ but all ended in failure.¹¹⁸ Now, in the 110th General Assembly, the House of Representatives has passed and sent to the Senate a broad proposal to establish the state's first Court of Claims, Substitute House Bill No. 800.¹¹⁹ This part of the note will explain and analyze the provisions of this bill.

¹¹⁷ Although no comprehensive consent statute has ever been enacted the state has consented to be sued in a number of limited areas. Statutes authorize the attachment, garnishment, and execution against the wages of state employees, OHIO REV. CODE ANN. § 115.46 (Page 1969); the foreclosure of certain pre-existing liens, OHIO REV. CODE ANN. § 5301.24 (Page 1970); suit to recover on water conservation bonds, OHIO REV. CODE ANN. § 1523.10 (Page 1964); and suit to recover certain fees paid to the secretary of state under protest, OHIO REV. CODE ANN. § 111.19 (Page 1969). In addition the state has given the right to "sue and be sued" to several state authorities. However, this right has been narrowly construed. See text accompanying notes 9-11 *supra*.

¹¹⁸ Between 1917 and 1953 the legislature rejected such bills at least eight times. Amended Substitute House Bill No. 82, defeated by tied floor vote, April 9, 1919, Bulletin of the 83rd General Assembly 132 (1919); House Bill No. 511, died in committee, 1923, Bulletin of the 85th General Assembly 220 (1923); Senate Bill No. 110, died in committee, 1935, Bulletin of the 91st General Assembly 41 (1935); Senate Bill No. 171, died in committee, 1937, Bulletin of the 92nd General Assembly 64 (1937); House Bill No. 123, died in committee, 1939, Bulletin of the 93rd General Assembly 193 (1939); House Bill No. 299, died in committee, 1945, Bulletin of the 96th General Assembly 276 (1945); Amended House Bill No. 217, reported out of committee, but never voted upon, 1949, Bulletin of the 98th General Assembly 276 (1949); Substituted House Bill No. 285, reported out of committee, but never voted upon, 1951, Bulletin of the 99th General Assembly 266 (1951).

On July 7, 1953, a broad consent statute was passed by the General Assembly. The bill, Amended Substitute Senate Bill No. 73, provided for consent to sue the state in contract and tort. Bulletin of the 100th General Assembly 27 (1953). It was vetoed by Governor Lausche on July 24, 1953. The governor stated that he thought the Sundry Claims Board worked well and saw no reason to abandon it. See 125 OHIO S. JOUR. 1159 (July 24, 1933). The legislature sustained his veto.

Between 1953 and 1971 only one of six proposed consent statutes received serious consideration. Amended House Bill No. 121, defeated in the House by a vote of 52-60, May 9, 1955, Bulletin of the 101st General Assembly 196 (1955); House Bill No. 925, indefinitely postponed July 23, 1960, Bulletin of the 103rd General Assembly 370 (1960); Senate Bill No. 402, indefinitely postponed July 10, 1961, Bulletin of the 104th General Assembly 104 (1961); Senate Bill No. 109, indefinitely postponed July 11, 1963, Bulletin of the 105th General Assembly 40 (1963); House Bill No. 109, indefinitely postponed March 17, 1963, Bulletin of the 106th General Assembly 223 (1965); House Bill No. 326, indefinitely postponed September 8, 1967, Bulletin of the 107th General Assembly 295 (1967).

In 1971, two consent statutes, House Bill Nos. 225 and 226 were proposed. House Bill No. 226 was indefinitely postponed but a substitute bill was favorably reported out for House Bill No. 225. Bulletin of the 109th General Assembly 269 (1971). The substitute bill contained provisions consenting to suit in tort and contract and establishing a Court of Claims to entertain such suits. The bill received a favorable vote of 59-21 in the House and was sent to the Senate. It was favorably reported out by the judiciary committee and was sent to the rules committee for scheduling a floor vote. While the bill was in the rules committee the sponsors of the measure discovered that the Ohio constitution stated that the legislature could create new courts, but only "whenever two-thirds of the members elected to each house shall concur therein," OHIO CONST. art. IV, § 15. Since the bill had fallen seven votes short of the required 66 House votes, the bill was never scheduled for a vote in the Senate.

¹¹⁹ House Bill No. 800 was one of two proposed consent statutes patterned on the previous Substitute House Bill No. 225. The House judiciary committee recommended its passage with amendments on July 2, 1973, and it passed the House by a vote of 81-14

A. *Consent Provisions*

Unlike earlier Ohio bills which proposed to waive the state's immunity only for tort and contract claims, the Proposed Court of Claims Act provides a broad, unlimited waiver. It simply states:

The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter.¹²⁰

The waiver provision is composed of two main elements: (1) a listing of the political entities which are included within the waiver, and (2) a statement of the degree to which the immunity of those entities has been waived.¹²¹

The state alone, and not the political subdivisions of the state, are included within the waiver provision. Unlike the sundry claims statute, the bill clearly and narrowly defines what claims are against the "state."

(A) "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.¹²²

on July 11, 1973. The Senate judiciary committee recommended several amendments and reported out a substitute bill on March 5, 1974. All references to the bill are to the bill in the form in which it was sent to the Senate rules committee. If passed the bill will go into effect January 1, 1975.

¹²⁰ Sub. H. B. 800, § 1, proposed OHIO REV. CODE § 2743.02(A), 110th General Assembly, Reg. Sess. (1973). Hereinafter all references to § 1 of the bill, which contains all the permanent law changes, will be cited only to the proposed new code sections.

¹²¹ The various state consent statutes can be classified by the degree to which they waive the state's immunity, however the term "state" may be defined. The simplest and most complete consent statutes are those which contain an unlimited, total or "blanket" waiver of state immunity. Both New York and Washington have "blanket" waivers, New York on all civil actions without exception, N.Y. CT. OF CLAIMS ACT § 8 (McKinney 1963), and Washington on all torts without exception, WASH. REV. CODE § 4.92.090 (Supp. 1972). A second class of consent statutes are those with "open-ended" waivers. See Lansing, *The King Can Do Wrong! The Oregon Tort Claims Act*, 47 ORE. L. REV. 357, 359 (1968). The "open-ended" approach involves a total removal of all sovereign immunity which is then qualified by a series of exceptions. The Federal Tort Claims Act takes this approach, carving out a number of broad exceptions. 28 U.S.C. §§ 2674, 2680 (1970). The Oregon statute is also an "open-ended" consent statute, but one with more limited exceptions. ORE. REV. STAT. § 30.270 (1971). The third class of consent statutes are "closed-ended," that is, the statute first affirms total immunity and then creates special exceptions to it. The prime example of a "closed-ended" waiver is the California provision. CAL. GOVT. CODE, § 815 (West 1966). Although the various approaches may be prompted by the same motives and intended to achieve the same results there may be important practical differences in the manner in which the statutes are interpreted. For example, a court is more likely to construe strictly a "closed-ended" consent statute than one which contains an "open-ended" or "blanket" waiver of immunity.

¹²² Proposed OHIO REV. CODE § 2743.01. It should be noted that the definition of

Further uncertainty is avoided by the definition of "political subdivisions."

(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.¹²³

The exclusion of political subdivision from the waiver of immunity provision contrasts sharply with the consent statutes enacted in other states, which have generally chosen the theoretically consistent position of abrogating sovereign immunity on all levels.¹²⁴ Although the same general policy arguments that have been made against continuing the sovereign immunity of the state can be made with respect to its political subdivisions, the exemption of political subdivisions from the provisions of the bill seems to be a sound practical judgment. Political subdivisions are local in nature and draw their funds primarily from local sources—not from the state. While the decision to give consent to suit on a state level was fully supported by the state Department of Finance,¹²⁵ many local political entities which are notably hard pressed for revenue may have been opposed to waiving their immunity. And, obviously, opposition to the bill by these entities would greatly diminish its chances for passage. Moreover, successful implementation of the bill's provisions without a substantial drain on the state's finances might remove many doubts about the desirability of extending the bill's provisions to include political subdivisions, and thus might well pave the way to more extensive legislation in the future.

Whatever the advisability of continuing the immunity of local political entities, the legislature's intent to distinguish between the state and its political subdivisions seems clear. The consent statutes enacted in New York and Washington totally waive those states' immunity, but do not define the term "state." Consequently, courts in both states have interpreted the statutes to cover claims against local political entities as well as claims against the state itself.¹²⁶ Since political subdivisions of the

"state" is in terms of the state's departments, agencies, etc., its corporate-type bodies, not its individual employees or agents. Thus, under the proposed Court of Claims Act the state would be liable for its employees' negligence in the same manner as any other corporate body, that is, there would have to be some theory (*e.g.*, *respondeat superior*) upon which the negligence of the agents could be imputed to the state. Without facts supporting such a theory the state could not be liable.

¹²³ *Id.*

¹²⁴ See, *e.g.*, ALAS. STAT. § 09.65.070 (1973); CAL. GOVT. CODE § 815 (West 1966); NEV. REV. STAT. § 41.031 (1971); ORE. REV. STAT. § 30.265 (1971); UTAH CODE ANN. §§ 63-30-2 to 63-30-10 (1968).

¹²⁵ See Statement of Joel S. Taylor at 1.

¹²⁶ *Holmes v. Erie County*, 266 App. Div. 220, 42 N.Y.S.2d 243, *aff'd* 291 N.Y. 789,

state of Ohio derive what immunity they do possess from the state, the specific exclusion of political subdivisions from the definition of "state" in the bill is necessary to avoid a total abrogation of the immunity doctrine at all levels.

Even though the effect of the bill is limited, in that only the state is included within the waiver of immunity, the state's waiver of immunity would be total. No function or activity of the state is expressly exempted from possible liability. This unlimited waiver stands in marked contrast to the provisions of such statutes as the Federal Tort Claims Act¹²⁷ and the California Tort Claims Act¹²⁸ which have a number of substantial limitations on liability.

Unlike most other consent statutes the bill contains no express exception from liability for a state officer's or employee's performance or failure to perform a discretionary function or duty.¹²⁹ In this respect the bill closely resembles the statutes enacted in Washington and New York which also contain no mention of this discretionary function immunity. However, the absence of any provision for such immunity does not mean that if the bill is enacted the state would be liable for all harm resulting from the acts of its employees. The courts of New York and Washington have been uniform in holding that immunity for discretionary functions exists apart from the sovereign immunity waived by statute.¹³⁰ Since a contrary holding could lead to undesirable results, possibly even to a serious obstruction of governmental operations,¹³¹ there is no reason to believe that a similar result would not be reached in Ohio.

Thus some form of discretionary function immunity would undoubtedly exist in Ohio despite the absence of any provision for it in the bill. By not defining the immunity itself, the legislature is leaving to the courts the problem of deciding the exact parameters of such an immunity. This is not wholly undesirable since any detailed legislative direction could probably not produce effective results in every situation. Allowing the courts to fashion a rule by reference to the facts before them and decisions

53 N.E.2d 368 (1943); *Bernadine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945); *Kelso v. Tacoma*, 63 Wash. 2d 913, 390 P.2d 2 (1964).

¹²⁷ 28 U.S.C. 2680 (1970).

¹²⁸ CAL. GOVT. CODE §§ 814-895.8 (West 1966).

¹²⁹ See, e.g., 28 U.S.C. § 2680(a) (1970); ALAS. STAT. § 09.50.250(1) (1973); CAL. GOVT. CODE § 815 (West 1966); NEV. REV. STAT. § 41.032.(2) (1971); ORE. REV. STAT. § 30.265(2)(d) (1971).

¹³⁰ *Gross v. State*, 33 App. Div. 2d 868, 306 N.Y.S.2d 28 (1969); *Rottkamp v. Young*, 21 App. Div. 2d 373; 249 N.Y.S.2d 330 *aff'd*, 15 N.Y.2d 831, 257 N.Y.S.2d 944, 205 N.E.2d 866 (1964); *United Brethren Church v. State*, 67 Wash.2d 246, 407 P.2d 440 (1965).

¹³¹ See, 36 WASH. L. REV. 312, 324 (1961).

in other jurisdictions should be more equitable, albeit, at least initially, more uncertain.

Since only the state's immunity is waived by the bill, any other form of common law immunity possessed by state officers or employees would continue to exist. Besides discretionary function immunity, which is usually considered an executive immunity, judicial immunity probably would not be waived by the bill. This immunity is broader than discretionary function immunity, since it reaches judicial acts whether discretionary or ministerial.¹³² The courts of both Washington¹³³ and New York¹³⁴ have recognized the continued viability of this immunity in the face of total waivers of sovereign immunity. Even if a judge acted in such a manner that he would not be individually immune from liability,¹³⁵ in order to establish a valid cause of action against the state, a claimant would have to develop some theory upon which the judge's liability could be imputed to the state.¹³⁶ Even if a judge could be considered a state officer or employee,¹³⁷ the theory of *respondeat superior* would have no application since judges are not subject to the direction and control of state authorities.¹³⁸ A judge would not, therefore, be an agent of the state for the purpose of imputing liability to the state. Thus the total waiver in the proposed Court of Claims Act would do nothing to change the present lack of effective legal redress for a party injured by the wrongful acts of a judge acting within the scope of his jurisdiction.¹³⁹

Perhaps the major problem concerning the extent of the state's liabil-

¹³² See *Truesdell v. Combs*, 33 Ohio St. 186, (1878); *Childs v. Voris*, 4 Ohio N.P. 67, 6 Ohio Dec. 75 (C.P. Summit Cty. 1897); *Voll v. Steele*, 141 Ohio St. 293, 47 N.E.2d 991 (1943).

¹³³ *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965).

¹³⁴ *Farrell v. State*, 204 Misc. 148, 123 N.Y.S.2d 29 (Ct. Cl. 1953).

¹³⁵ This would be true if, for example, the judge acted wholly without jurisdiction or authority. See *Brinkman v. Drolesbaugh*, 97 Ohio St. 171, 119 N.E. 451 (1918); *Maxey v. Gather*, 94 Ohio App. 115, 51 Ohio Ops. 310, 114 N.E.2d 607 (Summit Cty. 1952).

¹³⁶ See note 122, *supra*. See also, *Creelman v. Svenning*, 67 Wash. 2d 882, 410 P.2d 606 (1966) where the claimant conceded that the individual responsible for the harm was immune, but argued that the state should be liable anyhow. The court rejected this argument.

¹³⁷ There is considerable doubt whether a judge elected from a geographical area less than the whole state, exercising jurisdiction in only a part of the state, and paid only in part or not at all from state funds could ever be a state officer or employee within the meaning of the Act.

¹³⁸ The New York courts have often based their findings of no state liability for judicial acts on this lack of control and inapplicability of the theory of respondent superior. See *Farrell v. State*, note 134 *supra*; *Jamieson v. State*, 7 App. Div. 2d 944, 182 N.Y.S.2d 41 (1959).

¹³⁹ The Sundry Claims Board has repeatedly held that the state cannot be liable for damages based upon judicial errors. See, e.g., the well reasoned opinions in Sundry Claim No. 15050, Frank Johns (September 7, 1973), and Sundry Claims No. 15152, William Kammerer (September 7, 1973).

ity is caused by the language of the waiver itself. According to the bill, the state consents only "to have its liability determined . . . in accordance with the same rules of law applicable to suits between private parties. . . ." ¹⁴⁰ Since there are a number of functions which are intrinsically capable of performance only by the government and not by private parties, ¹⁴¹ the state may be immune from liability resulting from damages caused by these "uniquely governmental functions" despite the "blanket" waiver of immunity.

The exact meaning of the language providing for use of the same rules of law "applicable to suits between private parties" is far from clear. It could mean no more than that the same general tort and contract law principles which are applicable to private parties will be applied to the state to determine the extent of its duty in any particular situation. However, the "rules of law applicable to private parties" might be interpreted to mean only those rules which evolved specifically in the context of private party litigation, and which have no application to activities beyond the competence of private parties. The chief problem with the first interpretation is that at some point the analogy between actions of private parties and actions of the state breaks down. The chief problem with the second interpretation is that in its broader forms it limits the liability of the state more severely than may have been contemplated by the drafters.

Some possible guidance may be gained from the New York statute. It states that New York "consents to have [its liability] determined in accordance with the same rules of law as applied in the supreme court against individuals or corporations" ¹⁴² The New York courts have interpreted this phrase to make certain "uniquely governmental functions" immune from possible liability, but the exact extent of this immunity is still unclear. ¹⁴³ It is clear that the traditional distinction between governmental and proprietary functions has no application to the determina-

¹⁴⁰ Proposed OHIO REV. CODE § 2743.02(A). This same restriction specifically applies to appeals. "Appeals from . . . the court of claims lie to the same courts under the same circumstances, as appeals from the court of common pleas of Franklin county, and the same rules of law govern their determination." Proposed OHIO REV. CODE § 2743.20 (emphasis added).

¹⁴¹ See Borchard, *Government Liability in Tort*, 34 YALE L.J. 229, 240 (1925).

¹⁴² N.Y. Ct. of Claims Act § 8 (McKinney 1963).

¹⁴³ See, Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30 (1958) [Hereinafter cited as Herzog]. A similar distinction has been drawn under the Federal Tort Claims Act. See, *Dalehite v. United States*, 346 U.S. 15 (1952); *Indiana Towing Co. v. United States*, 350 U.S. 61 (1955). See also Note, *Federal Government Liability "As a Private Person" under the Tort Claims Act*, 33 IND. L.J. 339 (1958); Henke, *Oregon's Governmental Tort Liability Law From a National Perspective*, 48 ORE. L. REV. 45, 104-105 (1968) [Hereinafter cited as Henke].

tion of what activities are uniquely those of the state government.¹⁴⁴ Legislative decisions,¹⁴⁵ judicial acts,¹⁴⁶ quasi-judicial acts of administrative agencies,¹⁴⁷ and certain acts to preserve the public peace and safety¹⁴⁸ have all been held to create no possible liability because they are uniquely governmental. However the New York decisions are of limited value since they are neither uniform nor theoretically consistent.

It is submitted that the proper interpretation of the phrase should be one that does not frustrate the ostensible policy for which the bill was proposed, that is, to compensate parties injured by the state in a just, effective manner. Thus certain uniquely governmental functions should be exempt from liability, but the number of these activities should be limited by keeping three factors in view: (1) Most of the activities traditionally described as uniquely governmental can quite properly be placed in the discretionary function and judicial act immunities which will not be altered by the proposed Court of Claims Act;¹⁴⁹ (2) the question whether any other function should be exempt from liability should focus not on who performs the function, but rather on whether or not the state has a legal duty to perform the function;¹⁵⁰ (3) even though there are valid reasons for exempting from liability damage caused by purely governmental functions requiring some legislative, judicial, or administrative decision making, "there is no valid reason to extend the immunity to claims based upon negligent or wrongful conduct in the execution of such decisions."¹⁵¹

B. *Court of Claims Provisions*

1. Generally

Despite waiving immunity from suit and from liability generally, the bill would not permit the state to be sued in common pleas courts. Instead it would create a special Court of Claims.¹⁵²

The court of claims would be a court of record sitting in Franklin County and having exclusive jurisdiction of all actions removed thereto,

¹⁴⁴ *Id.* at 31.

¹⁴⁵ *Barrett v. State*, 220 N.Y. 423, 116 N.E. 99 (1917).

¹⁴⁶ *Farrell v. State*, 204 Misc. 148, 123 N.Y.S.2d 29 (Ct. Cl. 1953); *Fishbein v. State*, 204 Misc. 151, 120 N.Y.S.2d 92 (Ct. Cl. 1953).

¹⁴⁷ *See, e.g., Chikofsky v. State*, 203 Misc. 646, 117 N.Y.S.2d 26 (Ct. Cl. 1952).

¹⁴⁸ *See Herzog* at 38-41.

¹⁴⁹ This is especially true if decisions by the legislature are included in the discretionary function immunity exception.

¹⁵⁰ *See Henke* at 103-110.

¹⁵¹ *Id.* at 104.

¹⁵² Proposed OHIO REV. CODE § 2743.03(A).

as well as exclusive original jurisdiction of all actions permitted by the consent provisions of the bill. It also would specifically be given full equity powers and power to entertain counterclaims, cross claims, and third party claims.¹⁵³ The court would be staffed by incumbent or retired judges of the supreme court, courts of appeals, or courts of common pleas, temporarily assigned to the court by the Chief Justice of the supreme court. Ordinarily a single judge would hear and determine a claim against the state, but the bill would also empower the Chief Justice of the Ohio supreme court, upon application by either party, to appoint a panel of three judges to hear any claim involving novel or complex issues of law or fact. In such cases concurrence of two judges would be required to decide the claim.¹⁵⁴

The court of claims would operate similarly to the Court of Common Pleas of Franklin County. It would have the same power to subpoena witnesses, require the production of evidence, and punish for contempt as any court of common pleas.¹⁵⁵ Appeals from the court would be handled in the same manner as appeals from the Court of Common Pleas of Franklin County.¹⁵⁶

The establishment of a special court would eliminate one of the chief weaknesses of the present sundry claims procedure. The fate of a claim would no longer rest in the hands of officials of the executive or legislative branches of state government who have other full time non-legal duties, but instead would be entrusted to independent and legally trained judges, who would be experienced in handling litigation between private parties.

Establishing a court of claims is far more appealing than using the existing court system for several reasons. It would prevent this whole new class of civil suits from being added to the already overloaded dockets of existing courts. As a result, speedier trials should be possible. More importantly, to the extent that the judges of a special court would become more familiar with certain unique types of actions by handling them frequently, they should develop a certain expertise, resulting in a higher quality of jurisprudence. Claims such as those arising out of complicated multi-million dollar highway construction contracts, which usually incorporate hundreds of pages of standard and specialized specifications, would be more likely to be tried properly by judges who have experience with them than by judges who rarely if ever see such suits. More-

¹⁵³ The court also has jurisdiction over claims involving certain lake lands pursuant to Amended OHIO REV. CODE §§ 5313.04-05.

¹⁵⁴ Proposed OHIO REV. CODE § 2743.03(A)-(C).

¹⁵⁵ Proposed OHIO REV. CODE § 2743.05.

¹⁵⁶ Proposed OHIO REV. CODE § 2843.20. See note 2 *supra*.

over, a specialized court with appeals to a single court of appeals would permit a uniformity of judgment which could not be matched if existing trial courts were used.

The method of staffing the court should offer many advantages if properly implemented. Empowering the Chief Justice to choose the court of claims judges from the ranks of incumbent judges elected by the people combines the best features of the appointive and elective systems, and at the same time avoids the drawbacks of a state wide election for these highly sensitive positions. The Chief Justice would be given the power to appoint judges eligible for active duty pursuant to article IV, § 6(c) of the Ohio constitution.¹⁵⁷ Thus the Chief Justice would be allowed to continue to capitalize on the resources of able, but retired judges.

This provision should result in the selection of some of Ohio's most competent judges. It should also result in the maximum use of Ohio judicial resources by enabling the Chief Justice to select a competent retired judge or an incumbent judge whose caseload is not as great as those in heavily populated areas. The bill allows the judge to be selected to hear even a single claim, thus enabling the Chief Justice to capitalize on the special talents or expertise of a particular judge for a particular claim. If a claim involves an especially complex area, the Chief Justice might pick a judge with expertise in that area, instead of having to settle for the judge who has the fewest cases on his docket.

While the court would have statewide jurisdiction, as the bill is presently written the court would sit almost exclusively in Franklin County. The Chief Justice could direct it to sit in other counties, but only on removal claims, and even then only upon a showing of substantial hard-

¹⁵⁷ OHIO CONST. art. IV, § 6(C) was part of the modern courts amendments and reads in part:

No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge...

There are at least four classes of inactive Ohio judges that can be legally denominated as "retired," two of them voluntarily retired, and two of them involuntarily retired. The term "voluntarily retired judges" can be applied to those judges who voluntarily cease performing judicial functions either by choosing not to seek election to another term or by not completing the term to which they were elected or appointed. The term can also be applied to those judges who are no longer eligible for election or appointment because they are in excess of seventy years of age. The term "involuntarily retired judges" can be applied to those judges who were compulsorily retired due to a physical or mental disability, OHIO REV. CODE ANN. §§ 2701.11-12 (Page Supp. 1970), and to judges who were defeated in their efforts to be re-elected for another term. The constitutional amendment and therefore the bill, is carefully drafted to exclude judges who were compulsorily retired or defeated at a judicial election. See Milligan & Pohlman, *The 1968 Modern Courts Amendments to the Ohio Constitution*, 29 OHIO ST. L.J. 811, 837-838 (1968).

ship or when justice dictates.¹⁵⁸ In many areas the drafters of the proposed Ohio Court of Claims Act seemed influenced by the New York Court of Claims Act,¹⁵⁹ but in this area they neglected to learn from an important provision of the New York statute. The New York court has the ability to provide for regular or special sessions of the court for such terms and in such a manner as it may deem advisable.¹⁶⁰ The judges of the court have minimized the cost and inconvenience to claimants and witnesses by establishing a flexible schedule of two terms a year in eight cities other than the capital.¹⁶¹ Such extensive "circuit riding" would not be needed in Ohio since the Ohio proposal does not include local political entities within its waiver provisions. But in view of the extensive nature of state government services even in rural Ohio counties, a provision permitting some flexibility as to where the court would hear cases would seem advisable. A provision providing the Chief Justice of the Ohio supreme court with the authority to provide for terms in such places outside Franklin County as he would deem advisable would decrease the burden on claimants residing beyond central Ohio, without necessarily eliminating the advantage of centralized administration, filing, and appeals.

Among the most significant features of the proposed Court of Claims Act are the restrictions relating to the trier of fact. A delegate to the Ohio Constitutional Convention of 1912 expressed the fear that the state could not afford to be sued since juries would think that "The state has a lot of money and we will make the state pay."¹⁶² This fear appears also to have motivated the authors of the bill, which would allow claims to be tried only to a judge. The bill explicitly states that "no claimant in the court of claims shall be entitled to have his claim against the state determined by a trial by jury."¹⁶³ Although the Ohio Constitution provides that the "right of trial by jury shall be inviolate,"¹⁶⁴ the provision for only non-jury trials on claims against the state would undoubtedly be constitutional since the constitution has been interpreted to provide a right to a trial by jury only where the right existed at common law prior to the adoption of the Ohio constitution.¹⁶⁵

Apparently, the bill's denial of the right to a jury trial is based upon

¹⁵⁸ Proposed OHIO REV. CODE § 2743.03(B).

¹⁵⁹ N.Y. CT. OF CLAIMS ACT (McKinney 1963).

¹⁶⁰ *Id.* § 9(10).

¹⁶¹ N.Y. CT. OF CLAIMS RULES §§ 1200.1, 1200.2.

¹⁶² 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1919 (1912).

¹⁶³ Proposed OHIO REV. CODE § 2743.11.

¹⁶⁴ OHIO CONST. art. I, § 5.

¹⁶⁵ *Belding v. State ex rel. Heifner*, 121 Ohio St. 393, 169 N.E. 301 (1939).

the commonly held belief that juries would find the state liable more often and assess higher damages than would judges. Examples of sensational million-dollar personal injury awards are often cited to show a tendency on the part of juries to give excessive damages. However, the question whether or not juries are generally biased in favor of plaintiffs was investigated during the University of Chicago Jury Project, and statistics compiled during the project reveal that judges and juries agreed on liability in seventy-eight percent of all civil cases.¹⁶⁶ Of the twenty-two percent of the cases in which judge and jury disagreed, the jury favored the plaintiff in twelve percent of the cases while the judge favored the plaintiff in the other ten percent of the cases. Judges thus found for the plaintiffs fifty-four percent of the time, while juries found in the plaintiff's favor only slightly more often, fifty-six percent of the time.¹⁶⁷

While these findings would tend to discredit the popular belief that the jury is much more likely to find for the plaintiff than the judge as a general rule, in assessing the applicability of these findings to suits against the state it must be noted that the state is not an ordinary defendant. Indeed, the study revealed that when the defendant was a city or state the jury found liability eight percent more often than did the judge.¹⁶⁸ Although in an ordinary civil case the judge and jury were in substantial agreement on the question of the defendant's liability, they differed sharply on the amount of damages to which the plaintiff was entitled. Jury awards were about twenty percent higher than those by judges.¹⁶⁹ This difference increased to twenty-five percent when the defendant was a corporation, a city, or a state.¹⁷⁰ Thus the fear of the bill's framers that giving the right to trial by jury of claims against the state would cost the state more money than denying it, appears to be well-founded.

There may, however, be serious nonmonetary costs to eliminating jury trials. The judge may not be capable of fully performing some of the traditional jury functions in the same manner as a jury. Judges, like juries, must base their findings of fact upon their view of the proceedings. This view will always be colored by the viewer's background, experiences, prejudices and limitations. When eight persons are charged with this fact-finding duty, their personal characteristics may tend to cancel each other out resulting in a more unbiased fact-finding. While an experi-

¹⁶⁶ H. KALVEN AND H. ZEISEL, *THE AMERICAN JURY* 63 (1966). [Hereinafter cited as KALVEN AND ZEISEL].

¹⁶⁷ *Id.* at 64.

¹⁶⁸ Broeder, *The University of Chicago Jury Project*, 38 *NEB. L. REV.* 744, 750 (1958). [Hereinafter cited as Broeder].

¹⁶⁹ KALVEN AND ZEISEL at 64 n.13.

¹⁷⁰ Broeder at 750.

enced judge is usually considered an asset to the trial process, this may not always be true. Precisely because of their experience, judges may have a subconscious predetermination about a type of case, a general fact situation, or even the attorneys. A jury which hears only a few cases is less likely to have such predilections.¹⁷¹ "In weighing disputed testimony, a variety of minds developed by an array of human experience is the greatest assurance against error."¹⁷²

Perhaps the chief cost of eliminating jury trials is the loss of the jury's unique ability to bridge the gap between "law in the books, and law in action,"¹⁷³ its power to harmonize law and reality. There are situations in which the application of general rules of law will produce a result totally inconsistent with considerations of justice and equity. The denial of all relief in cases where the plaintiff is only slightly negligent while the defendant is extremely negligent is often cited as an example. The judge cannot act as a harmonizer because he is bound to write an opinion making specific findings of fact and discussing all the issues in view of the applicable law. In contrast, the jury's findings may be secret and only articulated in a general conclusionary form.¹⁷⁴ The jury's examination in secret of a harsh rule of law is more likely to bring that rule into accordance with community standards of justice than are the deliberations of a judge. While it may be argued that the legislature alone should make "corrections" in the law, "practice can not always wait upon the proper development of legal theories . . . Legislatures and courts are often laggards in the process of [harmonizing law and reality]."¹⁷⁵

While all these factors may have been considered and rejected by the drafters of the bill,¹⁷⁶ it is more probable that the provision making judges the sole triers of law and fact is an essential compromise between those who wanted to provide a legal remedy for wrongs committed by the state and those who feared such a remedy would cost too much. Without such a compromise the bill's chances for passage would be greatly decreased. Whatever may be the relative merits of trying a claim before

¹⁷¹ Hogan, *Thoughts on Juries in Civil Cases*, 50 A.B.A.J. 752, 753 (1964).

¹⁷² Summers, *Some Merits of Jury Trials*, 39 TULANE L. REV. 3, 11 (1964). [Hereinafter cited as Summers].

¹⁷³ Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18-20 (1910).

¹⁷⁴ See Summers at 9-10.

¹⁷⁵ J. MOORE, FEDERAL PRACTICE § 38.02[1], at 17 (2d ed. 1971).

¹⁷⁶ Here also the drafters may have been influenced by the New York statute. Although most states which permit suits against themselves have allowed these suits to be tried to a jury, the New York statute explicitly denies the right to trial by jury in all claims against the state. N.Y. CT. OF CLAIMS ACT § 12(3) (McKinney 1963). The fact that the provision has apparently worked well in New York, see McNamara, *The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 ST. JOHN'S L. REV. 1, 48 (1965), may have increased its influence.

a judge rather than before both a judge and jury, either alternative is more attractive than "trying" a claim before an administrative tribunal of five state officials.

2. Jurisdiction

As previously mentioned, the court of claims would have "exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in [the bill]."¹⁷⁷ Due to the restrictive definition of the word "state," it is clear that an action against any political subdivision of the state could not be brought in the court of claims. Unlike some earlier bills attempting to create a court of claims,¹⁷⁸ the proposed Court of Claims Act does not limit the jurisdiction of the court to specified tort or contract claims in which the claimant alleges damages in excess of a certain minimum or under a certain maximum. The bill proposes to abolish the Sundry Claims Board as of 1975,¹⁷⁹ to give the court of claims exclusive jurisdiction over those claims against the state authorized by the bill. However, the section of the bill containing the waiver of immunity specifically states that: "To the extent that the state has previously consented to be sued, the chapter has no applicability."¹⁸⁰ While this limitation on the chapter's applicability is easier to draft into legislation than a systematic review of all the instances in which the state has previously consented to suit, the state would be better served if the legislature would conduct such a review and make a determination of which suits should be maintained in a common pleas court and which should be maintained in the court of claims. It makes little sense to require plaintiffs to sue the secretary of state in the common pleas court to recover fees,¹⁸¹ while requiring them to sue the same department in the court of claims for the negligence of one of its employees.

The bill also provides for a mandatory removal from any state court of actions in which a party files a counterclaim against the state or makes the state a third-party defendant.¹⁸² The party filing the counterclaim or impleading the state would be required to file a petition for removal in the court of claims, stating the facts entitling him to removal, together

¹⁷⁷ Proposed OHIO REV. CODE, § 2743.03.

¹⁷⁸ *E.g.*, Am. Sub. H. B. 225, 109th General Assembly, Reg. Sess. (1972), restricted the proposed court's jurisdiction to contract claims in excess of \$1,000 and tort claims between \$1,000 and \$100,000.

¹⁷⁹ Sub. H. B. 800 § 2, 110th General Assembly, Reg. Sess. (1973).

¹⁸⁰ Proposed OHIO REV. CODE § 2743.02(A).

¹⁸¹ See note 117 *supra*.

¹⁸² Proposed OHIO REV. CODE § 2743.03(E)(1). The proposed removal provisions seem patterned upon the federal removal statute. See 28 U.S.C. § 1446 (1970). Thus federal precedents may be of some value in resolving any difficult issue which may arise.

with copies of all process, pleadings, and other papers served on him in the action.¹⁸³ If the court should find that the removal petition does not justify the removal or that the state is no longer a party it may remand a claim to the original court. Upon removal the court of claims would have the complete power to adjudicate all the claims in the case,¹⁸⁴ but the parties would retain their right to a jury trial of any claims not against the state.¹⁸⁵ All judicial orders issued prior to removal would remain in effect and all bonds or other security would remain valid.¹⁸⁶

The bill would also eliminate the double litigation problems inherent in the sundry claims procedure, since it specifically provides that the court "may entertain and determine all counterclaims, crossclaims, and third-party claims."¹⁸⁷ While this provision would cause some inconvenience to third parties impleaded by the state, these specific inconveniences would be far outweighed by the need to settle all related claims in one forum at one time.

3. Procedural and Substantive Rules

a. *Procedural rules*

As noted earlier, one of the primary deficiencies of the sundry claims procedure is the absence of explicit procedural rules. No such void would exist with the court of claims.¹⁸⁸ Except insofar as the bill would specifically establish special inconsistent procedures, the Rules of Civil Procedure would govern all practice and procedure in the court of claims. The bill notes that the supreme court may promulgate rules governing practice and procedure in actions against the state in the court of claims as pro-

¹⁸³ The petition for removal must be filed within twenty-eight days of the service of the complaint if based on a counterclaim and within fourteen days of service of the third-party complaint if based on third-party practice or within the time allowed for the original answer as extended by the original court. Within seven days of the filing of the removal petition, the petitioner would have to give written notice of the filing to all parties and file a copy of the petition with the clerk of court in which the action was originally commenced. This filing with the clerk of the original court would effect the removal of the action to the court of claims, and the clerk of the original court would forward all papers in the case to the court of claims. Proposed OHIO REV. CODE § 2743.03(E)(1)-(2).

¹⁸⁴ Proposed OHIO REV. CODE § 2743.03(E)(2).

¹⁸⁵ Proposed OHIO REV. CODE § 2743.11. Claims involving jury trials are heard in the chambers of the common pleas court of Franklin County or the county where a removed claim is heard. Jurors are selected and empaneled in the same manner as other cases in that court of common pleas. The State pays all expenses incident to a jury trial except juror costs which are taxed to the losing party.

¹⁸⁶ Proposed OHIO REV. CODE § 2743.03(E)(3).

¹⁸⁷ Proposed OHIO REV. CODE § 2743.03(A).

¹⁸⁸ Proposed OHIO REV. CODE § 2743.03(D).

vided by the Ohio constitution.¹⁸⁹ In addition the bill specifically provides that:

(A) The complaint or other pleading asserted in the court of claims against the state shall name as defendant each state department, board, office, commission, agency, institution or other instrumentality whose actions are alleged as the basis of the complaint.

(B) Upon the filing of the complaint or other pleading requiring services of summons, the clerk of the court of claims shall issue summons to each defendant and the attorney general. Summonses shall be in the form prescribed by and issued pursuant to the Civil Rules. The claimant shall file with the clerk one copy of the complaint or other pleading for each named defendant, plus four additional copies.¹⁹⁰

Thus the bill would make it very clear that the defendant (at least the nominal defendant) in any action is not the state as a whole, but the individual department, board, or agency involved.

The use of the Ohio Rules of Civil Procedure would be a marked change from the present sundry claims procedure. Claimants would be able to use such devices as a simplified form of pleading,¹⁹¹ broad discovery rules,¹⁹² and pretrial conferences.¹⁹³ The proper use of these devices would clarify the issues involved, facilitate the gathering of evidence, and largely prevent surprise defenses by the state, thus eliminating three practical problems inherent in the sundry claims procedure. Another key practical advantage of the rules is that the default judgment rule¹⁹⁴ would preclude a state agency from refusing to investigate a claim for long periods of time. While the provision can hardly guarantee that there would be no backlog of claims, as a practical matter the possibility that a claim-

¹⁸⁹ OHIO CONST. art. IV, § 5. The possible conflict between this section, a part of the modern courts amendment passed in 1968, and OHIO CONST. art. I, § 16, should be noted. Article I, § 16 provides in part that "suits may be brought against the state, in such courts and in such manner, as may be provided by law." Article IV, § 5(B) states in part: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge or modify any substantive right." The plaintiff in the *Krause* case argued that by not disapproving of the Rules of Civil Procedure, which in part provide for service of process on the state, the General Assembly gave its consent to suit. The court rejected the argument on the basis that the right to consent to suit was a substantive right which could not constitutionally be modified by any rules promulgated the Ohio Supreme Court. The court did not discuss the simpler argument that the more recent amendment, art. IV, § 5(B), modified the earlier provision, art. I, § 16, in such a way that the supreme court rather than the legislature could provide the courts and the manner in which suits could be brought against the state. In view of the court's interpretation of art. I, § 16, this argument would undoubtedly have been resolved against *Krause*.

¹⁹⁰ Proposed OHIO REV. CODE § 2743.13.

¹⁹¹ OHIO R. CIV. P. 8.

¹⁹² *Id.* 26.

¹⁹³ *Id.* 16.

¹⁹⁴ *Id.* 55.

ant would have to wait three years before the state investigates his claim will be miniscule.

It should be noted that the normal default judgment procedure might not be strictly applicable to the state. Rule 55(D) of the Ohio Rules of Civil Procedure states: "No judgment by default shall be entered against this state, a political subdivision, or officer in his representative capacity or agency of either unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."¹⁹⁵ The provision is patterned upon rule 55(e) of the Federal Rules of Civil Procedure,¹⁹⁶ but because there are several differences between Ohio rule 55 and the Federal rule 55, federal precedents may be of questionable value.¹⁹⁷ The staff notes indicate that the Ohio rule was intended for the state's protection and "requires that satisfactory proof, *as in Rule 55 (A)*, be taken before a default judgment may be entered."¹⁹⁸

Rule 55(A), which also deals with default judgments, states in part that:

If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.¹⁹⁹

When read literally the rule appears to leave the determination of the need for a hearing to the judge's discretion, at least when the sum requested is liquidated. However, the staff notes seem to indicate that a hearing is necessary in all cases.²⁰⁰ According to these notes, at the hearing the "necessary proof" required before a default judgment may be entered is "quite similar to the proof of claim requirement of § 2323.11, R.C."²⁰¹ Under that section the plaintiff was not automatically entitled to relief if he claimed an unliquidated sum. He could be required to prove that he had a good cause of action and the amount of his damages.²⁰² Thus the special requirement of rule 55(D) that the court be satisfied by

¹⁹⁵ *Id.* 55(D).

¹⁹⁶ FED. R. CIV. P. 55(e) states that: "No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."

¹⁹⁷ See staff notes for OHIO R. CIV. P. 55.

¹⁹⁸ *Id.* (emphasis supplied).

¹⁹⁹ OHIO R. CIV. P. 55(A).

²⁰⁰ See staff notes for OHIO R. CIV. P. 55(A).

²⁰¹ *Id.*

²⁰² *Streeton v. Roehm*, 83 Ohio App. 148, 38 Ohio Op. 240, 81 N.E.2d 133 (1948); see also Note, *Default Judgments in Ohio*, 12 W. RES. L. REV. 747 (1961).

the evidence of the plaintiff's claim should seemingly be interpreted to require no more than that a hearing be held at which the plaintiff must show both that he is entitled to relief and the extent of his damages. If interpreted in this manner the distinction between rule 55(A) and rule 55(D) would not be a burden on the claimant and, in view of the slight possibility that the state would default in any action, would be of little practical significance, other than to force the state department, board, office, commission, agency, institution, or other instrumentality²⁰³ to investigate the claim promptly.

The potential conflict between rule 55(D) and rule 37(B)(2)(c) might be of more practical significance. The latter rule provides that if a party fails to obey an order to provide or permit discovery the court may, among other things, render "a judgment by default against the disobedient party."²⁰⁴ Whether this power would be qualified by rule 55(D) is an open question, but presumably since the procedure under rule 55(D) is the same as that which might be required under rule 55(A) for private defendants, the rule does not give the state special rights which would allow it to escape a just sanction for failure to allow discovery. If rule 55(D) were interpreted to give the state a special exemption from the rule 37(B)(2)(c) sanction of default, the claimant would be put into the untenable position of having to prove his case without being allowed to use the traditional discovery tools with which to do it. Thus the default judgment sanction under rule 37 should be applied even when the state is the defendant.

While the procedural provisions of the bill would correct many of the problems inherent in processing claims before the Sundry Claims Board, all the advantages of an informal, administrative procedure designed for claimants who are not represented by counsel and who claim only small amounts are retained. The bill provides that "Upon written consent of the claimant, claims against the state for amounts greater than one hundred dollars and less than one thousand dollars may be heard and determined administratively by the clerk of the court of claims,"²⁰⁵ who would be required to be licensed to practice law in Ohio.²⁰⁶ Claims of less than one hundred dollars would automatically be determined administratively by the clerk. These small claims would be filed on special forms pre-

²⁰³ Hereinafter the term "department" alone will be used to signify the instrumentality whose actions form the basis of the complaint. The term should be understood to encompass all state departments, boards, offices, commissions, agencies, institutions or other instrumentalities.

²⁰⁴ OHIO R. CIV. P. 37(B)(2)(c).

²⁰⁵ Proposed OHIO REV. CODE § 2743.10(A).

²⁰⁶ Proposed OHIO REV. CODE § 2743.07(A).

scribed by the supreme court, and copies would be forwarded to the attorney general and to the state department involved. The latter would then investigate the claim and send a report to the clerk within sixty days of receipt of the copy of the claim. The clerk then would have to forward a copy of the investigation report to the claimant, who would then be given a chance to respond either in writing or by appearing before the clerk,²⁰⁷ presumably in an informal administrative hearing.²⁰⁸ The clerk would be given the authority to establish procedures for such claims, but these procedures would have to be informal and designed for laymen rather than lawyers. Although the clerk's decision would have to be based on the same principles of law applied in the court of claims, strict rules of evidence would not be applicable in any administrative determination. The clerk would make a final decision, fully noting his findings of fact and conclusions of law.²⁰⁹ Upon motion of either party the court of claims would have to review the clerk's decision upon the basis of his report and the papers filed in the claim and enter a judgment in accordance with its findings. This judgment could not be appealed and no further civil action arising out of the same facts or transaction could be commenced in the court of claims.²¹⁰

While the identical goal of having an informal administrative procedure for small claims could be accomplished by the retention of the present Sundry Claims Board for such claims, the legislature specifically rejected this approach.²¹¹ The institution of a new administrative procedure would have several advantages over the retention of the Sundry Claims Board. As opposed to the present procedure, the state would be required to investigate all claims within sixty days, which should result in quicker final determinations. Moreover, the final determination would be made by someone skilled in Ohio law and would be based on Ohio law, which should eliminate any doubt as to the applicable legal standards and the competence of those who apply them; and if either party doubts that the decision is based on a correct interpretation of the law he would be allowed a review in a court of law as of right.

b. Statutes of limitation

The proposed Court of Claims Act contains a special statute of limita-

²⁰⁷ Proposed OHIO REV. CODE § 2743.10(B).

²⁰⁸ The bill does not specify that an informal hearing would have to be held in any case, but reading the section as a whole and in view of current Sundry Claims Board practice, it appears that an informal hearing is intended whenever the claimant so desires.

²⁰⁹ Proposed OHIO REV. CODE § 2743.10(C).

²¹⁰ Proposed OHIO REV. CODE § 2743.10(D).

²¹¹ Am. Sub. H. B. 225, 109th General Assembly, Reg. Sess. (1972) would have retained

tions applicable to all actions in the court of claims. As a general rule, all claims against the state permitted by the bill would have to be commenced within two years of the accrual of the cause of action. However, in cases of injury to property or personal injury caused by tortious conduct, either the claim itself or a written notice of intention to institute such a claim would have to be filed in the court of claims within 180 days of the accrual of the cause of action. In cases of claims for damages for wrongful death caused by tortious conduct, either the claim or a written notice of intention to file a claim would have to be filed in the court of claims within 180 days after the appointment of the executor or administrator of the decedent's estate. Even if written notice of intention to file a claim is filed, claims would have to be commenced within two years of the time of the accrual of the cause of action. The applicable period of limitations would be tolled under normal statutory conditions,²¹² except that there would be no tolling during imprisonment unless the imprisoned person were of unsound mind.²¹³

The required contents of the written notice of intention are specifically delineated.²¹⁴ Failure to include all required information in the notice would be grounds for dismissal. However, the court would have discretion to permit a claimant who failed to file a notice on time to file his action within two years of accrual of the cause of action if good cause were shown or if the claimant could show that the state or its agents had knowledge of the essential facts constituting the claim prior to the expiration of the 180-day period.²¹⁵

Normally, statutes of limitation are enacted to assure an end to litigation and to establish a state of stability and repose.²¹⁶ They are based on the premise that "stale" claims cannot be justly resolved and should not be permitted. If actions could be commenced at any time after the actionable conduct occurred the court may be incapable of reaching a just result because key evidence may have been destroyed or lost, memories may have become distorted, and witnesses may have moved away or died. In the legislature's discretion, various statutes of limitation ranging from

the Sundry Claims Board for such claims, as would have H. B. 983, 110th General Assembly, Reg. Sess. (1973).

²¹² OHIO REV. CODE ANN. § 2305.16 (Page Supp. 1972) provides that the statute of limitations shall be tolled whenever the person entitled to bring the action is within the age of minority, of unsound mind, or imprisoned.

²¹³ Proposed OHIO REV. CODE § 2743.16(A).

²¹⁴ Proposed OHIO REV. CODE § 2743.16(C).

²¹⁵ Proposed OHIO REV. CODE § 2743.16(D).

²¹⁶ See *LaBarbera v. Batsch*, 10 Ohio St. 2d 106, 114, 227 N.E. 2d 55, 62 (1967); *Wylar v. Tripi*, 25 Ohio St. 2d 164, 171, 267 N.E.2d 419, 423 (1971); Callahan, *Statutes of Limitations—Background*, 16 OHIO ST. L.J. 130 (1955).

twenty-one years²¹⁷ to one year²¹⁸ have been set for actions between private parties in Ohio.

The special statute of limitations in the bill would actually result in longer time limitations in a few cases,²¹⁹ but when the bill's provisions as a whole are compared with the statutes of limitation applicable to actions between private parties, the provisions seem arbitrarily and illogically short.²²⁰ If a person is injured in an automobile accident caused by the negligent driving of a private individual, the injured party normally has two years in which to commence his action.²²¹ If the same person is injured in the same manner by a state employee acting within the scope of his employment, the injured party would have only six months in which to file either his action or his written intention to file an action against the state. Also, while it is possible that the state may have a higher turnover in personnel than private businesses and may not retain written records or documents of evidentiary value as long as private businesses do, these factors hardly justify a thirteen-year difference in the length of the statute of limitations on written contracts between private parties and the state.²²²

The harsh effects of the six-month time limit may be mitigated somewhat by the provision granting the court the discretion to allow a claimant who failed to meet the 180-day deadline to file his claim within two years of its accrual if good cause can be shown, or if it can be shown that the state knew the essential facts of the claim before the expiration of the 180-day period. However, it is easy to imagine claims in which at least one of the essential facts would be unknown to the state before the

²¹⁷ OHIO REV. CODE ANN. § 2305.04 (Page 1954) provides that actions to recover title to or possession of real property must be brought within 21 years after the cause of action accrues.

²¹⁸ OHIO REV. CODE ANN. § 2305.11 (Page 1954) provides that actions for libel, slander, assault, battery, malicious prosecution, false imprisonment, malpractice, or upon a statute for a penalty or forfeiture must be brought within one year after the cause of action accrues.

²¹⁹ See actions mentioned *supra* note 218.

²²⁰ The bill's provisions are arbitrarily short in comparison with the statutes of limitations applicable to actions between private parties in Ohio, but not in comparison with statutes of limitations applicable to claims against the state in states other than Ohio. There is a definite trend to limit the time in which an action may be brought against a state. See, e.g., WASH. REV. CODE § 4.92.100 (Supp. 1973) (same statutes of limitations but the state must receive notice of the claim within 120 days), ORE. REV. STAT. § 30.275 (1971) (two-year statute of limitations with a requirement that notice be given to the state within 180 days) N. Y. CT. OF CLAIMS ACT § 10 (McKinney 1963) (two-year general statute of limitations with a requirement that notice must be given to the state within 90 or 180 days depending on the type of claim); CAL. GOVT. CODE §§ 911.2, 945.6 (West 1966) (claim must be presented to government within 100 days or one year depending on the type of claim; if rejected by the government, suit must generally be commenced within six months of rejection).

²²¹ OHIO REV. CODE ANN. § 2305.10 (Page 1954).

²²² OHIO REV. CODE ANN. § 2305.06 (Page Supp. 1972).

action was filed. The bill leaves the meaning of "good cause" and "essential facts" entirely to the court. Moreover, even if good cause, or total state knowledge of the essential facts, or both, were shown, the judge would still have discretion not to allow the claim. In view of the reluctance of appellate courts to find an abuse of trial judges' discretion, a deserving claimant could well be left without a remedy.²²³

The shorter time limits in the bill seem to be based solely on the fact that the state is the defendant, and thus seem to be more a reflection of a desire to reduce the total amount of damages for which the state might be liable rather than to prevent any "stale" claims which could not be justly resolved. It is also possible that this indirect means of limiting the damages the state could have to pay was intended to forestall some objections to the bill and to ensure its passage. However, equitable considerations would seem to require that statutes of limitation apply uniformly to all defendants.²²⁴

c. Limitations on the amount of recovery

Unlike Amended Substitute House Bill No. 225, which was considered by the 109th General Assembly, the proposed Court of Claims Act contains no direct or jurisdictional limit on the amount of damages which the court may award. During debate on the bill on the House floor there was an attempt to limit the maximum award to \$100,000, but the attempt failed.²²⁵ However, damages would be subject to reduction by another provision. The bill states that, "Awards against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery by the claimant."²²⁶

Even though tort damages are generally compensatory in nature, Ohio has long been an adherent of the collateral source rule, permitting an injured plaintiff to receive full recovery from the tortfeasor despite the fact that the plaintiff may have been compensated in whole or in part from other sources.²²⁷ While the rule has come under increasing criticism,²²⁸

²²³ See, e.g., *Lee v. Jennings Transfer Co.*, 14 Ohio App.2d 221, 223, 237 N.E.2d 918, 920 (1967): "To constitute an abuse of discretion, an unreasonable, arbitrary or unconscionable attitude on the part of the trial court must be shown by the party asserting a claimed abuse of discretion."

²²⁴ Indeed such equity may be required by the equal protection clause. See *Turner v. Staggs*, 89 Nev. 230, 510 P.2d 879 (1973); *Reich v. State Highway Dep't.*, 386 Mich. 617, 194 N.W.2d 700 (1972).

²²⁵ The vote on the amendment was 26-69. 135 OHIO H. JOUR.— (July 11, 1973).

²²⁶ Proposed OHIO REV. CODE § 2743.02(B).

²²⁷ *Pryor v. Webber*, 23 Ohio St. 2d 104, 263 N.E.2d 235 (1970).

²²⁸ See Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

and the Sundry Claims Board has abandoned it,²²⁹ Ohio courts have continued to make the tortfeasor pay for the injured party's wages which were never lost and expenses which were never paid. The rejection of the rule in the bill could be based on sound tort policy as well as on a legislative desire to prevent windfalls to the claimant at state expense, and should cause little injustice to injured parties.²³⁰

As a general rule, the proposed system would allow interest on any judgment, to be paid in the same manner and at the same rate as in litigation between private parties.²³¹ The only exceptions would be that (1) no interest would be allowed beyond sixty days after receipt of the judgment for payment by the Auditor, and (2) no interest would be allowed for the time between 180 days after the accrual of the cause of action and the filing of the complaint in the action. The court would also have the discretionary power to deny interest for any period of undue delay for which the claimant is responsible between the filing of the complaint and the rendition of the judgment.²³² The interest provision, especially when coupled with the special statute of limitations, would provide a disincentive for delay in prosecuting a claim, but it would not adversely affect the diligent claimant if the state pays the judgment within sixty days. Using the power to withhold interest for unwarranted delay is a unique idea and could help keep the court's docket relatively current. Although cutting off interest after sixty days after the Auditor receives a certification of the judgment may seem arbitrary, it would be of little practical consequence. Payments are normally processed within sixty days now and any unwarranted delay could be checked by use of a writ of mandamus.

4. Payment of Judgments against the State

Claimants not using the optional administrative procedure would proceed to trial as they would in any other civil action. An assistant attorney general or special counsel appointed by the attorney general would defend the state.²³³ The issues would be tried before the court, and if judgment were rendered against the state, the court would have to specify which state department was liable.²³⁴ After all appeals were determined,

²²⁹ See note 93 *supra*.

²³⁰ California has judicially abrogated the rule in claims against the state based on the premise that it is punitive, and under the California consent statute the government cannot be liable for punitive damages. See *Salinas v. Souza & McCue Constr. Co.*, 66 Cal. 2d 217, 424 P.2d 921, 57 Cal. Rptr. 337 (1967).

²³¹ Proposed OHIO REV. CODE § 2743.18(A).

²³² Proposed OHIO REV. CODE § 2743.18(B).

²³³ Proposed OHIO REV. CODE § 2743.14.

²³⁴ Proposed OHIO REV. CODE § 2743.19(A).

and all rights to appeal exhausted,²³⁵ the clerk would forward a certified copy of the judgment to the state auditor and to the Office of Budget and Management. The latter would then have to check the financial accounts of the particular defendant to see if sufficient unencumbered moneys would be available in the biennial appropriations made to the department by the legislature. If the Office determined that sufficient funds were available, it would certify that fact to the Auditor. Upon this certification, the Auditor would draw a warrant to the Treasurer of State for the judgment and applicable interest, and would charge the amount to the available unencumbered funds of the defendant state department. If the Office of Budget and Management determined that there were not sufficient available unencumbered funds in the defendant's budget, then it would have to request that the judgment be paid out of the emergency purposes fund or any appropriations for emergencies or contingencies. If there were sufficient moneys in this fund, they would have to be used to pay the claimant.²³⁶ If there were not sufficient unencumbered moneys in the emergency purposes fund, the defendant department would have to request that the General Assembly make an appropriation to the defendant department to pay the judgment. The request would have to be made in the current biennium and in each succeeding biennium until a sufficient appropriation were made.²³⁷ An award based upon an administrative determination by the clerk would be paid in the same manner.²³⁸

The payment provisions outlined in the bill would be exclusive and no execution could issue against the state.²³⁹ The various stages in the payment process would be controlled completely by state officials. While the claimant could enforce the payment provision by writ of mandamus,²⁴⁰ he would take no direct part in the process.

While a provision mandating that judgments be paid from a special claims fund would be much simpler, the more complex approach of the proposed Court of Claims Act would have a distinct advantage in that it attempts to secure a measure of departmental responsibility for its actions. Unlike the sundry claims procedure in which claims based upon a particular department's misconduct are satisfied by special appropriations of

²³⁵ Proposed OHIO REV. CODE § 2743.19(D). The subsection also states that if only part of a judgment is appealed, and the portion of the judgment not appealed provides for payment of a claim, that portion of the judgment may be processed.

²³⁶ Sufficient moneys would exist in such funds when there would be "moneys greater than the sum total of then pending emergency purposes fund requests or requests for releases from the other appropriations." Proposed OHIO REV. CODE § 2743.19(C)(5).

²³⁷ Proposed OHIO REV. CODE § 2743.19(C)(6).

²³⁸ Proposed OHIO REV. CODE § 2743.10(E).

²³⁹ Proposed OHIO REV. CODE § 2743.19(B).

²⁴⁰ Proposed OHIO REV. CODE § 2743.19(C).

the legislature, the bill would require that, whenever possible, the judgment must be paid from the department's current budget. The bill would make the position of a state department roughly analogous to that of a private corporate defendant. The more negligent a particular department would be, the more that department would have to "tighten its belt" to find the funds to pay the judgments rendered against it. The attempt to inject financial accountability into the process should theoretically reduce the number of torts, breaches of contract, and other injurious acts, committed by any particular department. However, if carried to an extreme, it could also reduce the amount of beneficial public services which that department could perform. A few large judgments could cripple a department operating on a tight budget. Because most departments would have unencumbered funds²⁴¹ in their budgets throughout most of the biennium, this crippling effect could hit at any time.

However, the bill contains a provision which would prevent this extreme result. A judgment could only be paid from a department's budget if the Office of Budget and Management certified the "availability of unencumbered funds" to the auditor. However, the Office of Budget and Management would have the "sole discretion to determine whether or not unencumbered moneys . . . are available for satisfaction."²⁴² While the exact meaning of this phrase is less than clear, the section presumably would give the Office the authority to say that the unencumbered funds are not available because they have been budgeted for other purposes which are more important to the state. If the phrase were interpreted in this manner, the Director of the Office of Budget and Management, working in conjunction with the executive of the department involved, would have wide discretion concerning when to tax a department's budget with payment of the judgment. Thus the bill would strike a balance between the need for departmental responsibility for legal wrongs and the need for uninterrupted state services.²⁴³

²⁴¹ Neither the Ohio Revised Code, nor the proposed Court of Claims Act, nor the biennial budget define the term "unencumbered funds." The Office of Budget and Management has understood the term "encumbered funds" to mean funds which the state is under a current obligation to pay. Thus funds allocated for debts for such things as contracted services or materials, incurred but not yet paid, would be encumbered because the state has a presently existing obligation to disburse them. Funds for *future* programs, services, materials, etc., although budgeted would be unencumbered.

²⁴² Proposed OHIO REV. CODE § 2743.19(C)(4).

²⁴³ A similar balance was struck in the state of Washington. There the Director of the Office of Program Planning and Fiscal Management must authorize the payment of all claims against the state from a special tort judgment fund appropriated by the legislature. The director then must order the state agency responsible for the tort to reimburse the claims fund from funds which the legislature has appropriated to that agency for its use. In any case where reimbursement would seriously disrupt the operation of a state agency the director may waive the agency's obligation to reimburse the claims fund. The director

If the Office of Budget and Management did not certify that sufficient unencumbered funds are available in the department's budget, the judgment would then have to be satisfied, if possible, from the second source, the emergency purposes fund. Unlike the action in the previous stage, there would be no discretion involved in attempting to pay the judgment from the second source. The Office of Budget and Management would have to apply to the controlling board²⁴⁴ for an appropriation from the emergency purposes fund,²⁴⁵ and the board would have to comply with the request if sufficient moneys existed in the fund. The fund is extremely large and contains substantial amounts of unrestricted funds.²⁴⁶ As a practical matter the chances of this fund running dry are slim, and thus claimants who successfully assert a claim over \$1,000 would be much more likely to be paid promptly under the provisions of the bill than under the present sundry claims procedure.

If, however, the controlling board were unable to pay the judgment, the defendant department would have to request that the General Assembly make an appropriation sufficient to pay the judgment. Such a request would have to be made each biennium until the appropriation is made. While the General Assembly would remain free to refuse such a request, such action would undoubtedly have political consequences. It is much more probable that the amount of the requested appropriation would be included in the department's biennial budget. Even if forced to resort to this last source of funds for satisfaction of the judgment, the successful claimant would still be in much better position than if his claim were part of the annual sundry claims bill. In both cases the claimant would not receive any money until an appropriation were passed by the General Assembly, but under the proposed Court of Claims Act the appropriation would be less subject to political partisanship, because the legislature

must report all payments, reimbursements, etc. to the legislature biennially. WASH. REV. CODE § 4.92.160 (Supp. 1973).

²⁴⁴ The controlling board controls the emergency purposes fund. It is created by the biennial appropriations act. (Am. Sub. H. B. 86, § 25, 110th General Assembly Reg. Sess. (1973)). It is composed of the Director of the Office of Budget and Management or a designated employee of the office, the chairmen of the House and Senate finance committees, two members of the House, and two members of the Senate. It exercises all functions of the emergency board created by OHIO REV. CODE ANN. §§ 127.01-04 (Page 1969). Upon the vote of four members the board is empowered to authorize the release of moneys in the emergency purposes fund to the various state departments. The board also has substantial power to transfer funds within a department.

²⁴⁵ The General Assembly appropriates money to the fund from the general revenue fund and from some of the smaller funds. Some of the moneys so appropriated are limited in how they may be used. See, e.g., Am. Sub. H. B. 86, § 20 at 138-39, 110th General Assembly Reg. Sess. (1973) where funds are limited for compensation adjustment.

²⁴⁶ Am. Sub. H. B. 86, 110th General Assembly Reg. Sess. (1973) appropriated in excess of \$77 million to the fund. Of this amount over \$9 million were not restricted.

could be sure that the decision was based on legal, not political considerations.

The bill carries the analogy of a state department defendant to a private corporate defendant one step further by providing the director or other administrative chief of any department, with the option of settling any action against his department but this settlement or compromise would first have to be approved by the attorney general.²⁴⁷ The claimant's acceptance of such a compromise or settlement would be final and conclusive upon the claimant and constitute a complete release of the state insofar as the particular department were concerned. Once approved by the attorney general, the claim would be paid in the same manner as judgments against the state.²⁴⁸

The settlement option would provide the director of the defendant state department with the needed flexibility to fully and fairly defend the total interest of the state, and thus represents a substantial advance over the present sundry claims procedure. Since the department could be held financially accountable for its judgments in much the same manner as private defendants, the departmental director would have an incentive not present in the sundry claims procedure to settle or compromise a claim.²⁴⁹ Also, unlike the sundry claims procedure, in which a director's temptation to admit liability or damages (the only form of "settlement") for non-legal reasons is checked only by a review by the board itself, the requirement that all settlements or compromises would have to be approved by the attorney general should insure that any concessions by the state are made primarily on the basis of legal considerations.

IV. CONCLUSION

Sovereign immunity has long outlived whatever valid purpose it may have had. It has resulted in injustice to the people of Ohio. This injustice was only slightly lessened by the sundry claims procedure. In 1917 the creation of the Sundry Claims Board was a step forward for the State of Ohio, but today, over half a century later, the Sundry Claims Board has changed only slightly and remains the basic forum for redress of wrongs committed by the State of Ohio. Fifty-seven years of experience have proved that the sundry claims procedure is totally inadequate for the needs of the people of Ohio. The relief afforded by the proposed Court of Claims Act is long overdue. The Act would create a court system in line

²⁴⁷ Proposed OHIO REV. CODE § 2743.15(A).

²⁴⁸ Proposed OHIO REV. CODE § 2743.15(B).

²⁴⁹ Since the specific department would not have to pay for its legal services (part of the budget of the attorney general), as a private defendant would have to do, the relative bargaining strength of the parties is not exactly the same as that between private parties.

with the needs of a people who have an increasing exposure to state government in their daily lives. Its few defects could be easily remedied by amendment, or by supplemental legislation. However, even without such amendments its advantages far outweigh its defects. The Act would put Ohio in the ranks of those progressive states which have abolished the ancient doctrine of sovereign immunity and have consented to suit in a court of law.

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